reme Court, U.S.
FILED

No. 04 775 DEC 6 - 2004

OFFICE OF THE CLERK

In The

Supreme Court of the United States

BLAINE COUNTY, MONTANA; DON K. SWENSON, ARTHUR KLEINJAN, and MARY DELORES PLUMAGE, in their official capacities as members of the Blaine County Board of Commissioners; and SANDRA BOARDMAN, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County,

Petitioners,

v.

UNITED STATES of America,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

J. SCOTT DETAMORE, ESQ.
Counsel of Record
WILLIAM PERRY PENDLEY, ESQ.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the enactment of Section 2 of the Voting Rights Act (VRA) constitutes a constitutional exercise of Congress' power under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments as applied to at-large voting in political subdivisions not covered by Section 5 of the VRA?

2. Whether an alleged violation of Section 2 of the VRA requires proof:

a. That a minority group has been denied the equal opportunity both to participate in the political process and to elect its candidates of choice?

b. That a causal connection exists between past or present purposeful discrimination and the minority group's lack of opportunity to participate in the political process and to elect candidates of its choice?

c. That the minority group is politically cohesive because it possesses distinctive and unique political interests that can be addressed by the election of its candidate of choice to the political body in question?

LIST OF PARTIES

Petitioners were Defendants in the U.S. District Court for the District of Montana, except that Victor J. Miller, a county commissioner originally named was replaced in January 2003, by Mary Delores Plumage. Joseph F. McConnell, Franklin R. Perez, Candace D. De Celles, Cheryl Sears, Wesley D. Cochran, Linda M. Buck, Donald L. Long Knife, Daniel Kinsey, and the Fort Belknap Community Council were denied intervention on the merits but granted intervention in the remedy phase. They did not participate in the appeal.

CORPORATE DISCLOSURE STATEMENT

Because petitioners are a county and its officers in their official capacities a corporate disclosure statement is not required by Supreme Court Rule 29.6.

TABLE OF CONTENTS

	Page
Questions Presented	i
List Of Parties	ii
Corporate Disclosure Statement	iii
Table Of Contents	iv
Table of Authorities	vii
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statutory Provisions Involved	2
Statement Of The Case	2
Reasons For Granting The Writ	5
I. Whether Section 2 is constitutional as applied here is an extremely important question of federal law with far-reaching Federalism implications that has not been, but should be, settled by this Court	5
A. The Ninth Circuit's holding that it was bound by this Court's summary affirmance in *Mississippi Republican Party v. Brooks* conflicts with the Second Circuit Court of Appeals	5
B. Whether Congress exceeded its authority under the enforcement Powers is a critical issue implicating the foundation of Federalism set out in the U.S. Constitution	7

TABLE OF CONTENTS – Continued

Page

II. The Ninth Circuit's analysis of Congressional power under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments conflicts with decisions of this Court and other circuits 8

A. Section 2 of the VRA is "prophylactic legislation" because it proscribes facially neutral conduct 8

B. Prophylactic legislation must be a congruent and proportionate response to an identified history of a widespread pattern of purposeful discrimination 9

C. The Ninth Circuit ignored *Boerne* through *Lane* and created its own tests 11

1. The Ninth Circuit failed to identify the scope of the constitutional right at issue 12

2. The Ninth Circuit held that a history of unconstitutional conduct by the States is irrrelevant 12

3. The Ninth Circuit held that upholding a nationwide ban on literacy tests *a fortiori* renders Section 2 constitutional 13

4. The Ninth Circuit, while purporting to do so, did not analyze any history of nationwide voting discrimination ... 15

D. The Ninth Circuit ruled that *City of Rome* is dispositive of the constitutionality of Section 2 18

TABLE OF CONTENTS – Continued

Page

E. The Ninth Circuit held that Congress' desire to avoid the difficulty and divisiveness of constitutional proof was sufficient justification for Section 2's enactment 19

III. The Ninth Circuit held that Section 2 does not require proof of a minority group's unequal opportunity to participate in the political process 21

IV. The Ninth Circuit held that proof of purposeful discrimination is irrelevant 24

V. The Ninth Circuit held that whether minority groups possess unique or distinctive political interests is irrelevant 27

Conclusion 29

TABLE OF AUTHORITIES

Page

CASES

Baird v. Consolidated City of Indianapolis, 976 F.2d 357 (7th Cir. 1992) 27

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) ..... *passim*

Bush v. Vera, 517 U.S. 952 (1996) 6

Chisom v. Roemer, 501 U.S. 380 (1991) 6

City of Boerne v. Flores, 521 U.S. 507 (1997) ..... *passim*

City of Mobile Alabama v. Bolden, 446 U.S. 55 (1980) ..... *passim*

City of Rome v. U.S., 446 U.S. 156 (1980) 7, 11, 18, 19

Farrakhan v. Washington, 359 F.3d 1116 (9th Cir. 2004) 6, 17

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999) 5, 9, 10, 17

Georgia v. Ashcroft, 539 U.S. 461 (2003) 22, 24

Goosby v. Town Board of Hemptstead, N.Y., 180 F.3d 476 (2d Cir. 1999), *cert. denied*, 528 U.S. 1138 (2000) 27

Holder v. Hall, 512 U.S. 874 (1994) 6

Johnson v. De Grandy, 512 U.S. 997 (1994) 6, 22, 24, 25

Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984) 11

Jordan v. Winter, 604 F.Supp. 807 (N.D. Miss. 1984) 5

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) 5, 15

TABLE OF AUTHORITIES – Continued

Page

League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1993) (*en banc*) 26

Major v. Treen, 574 F.Supp. 325 (E.D. La. 1983) 11

Miller v. King, 384 F.3d 1248 (11th Cir. 2004) 11, 12

Milwaukee Branch of N.A.A.C.P. v. Thompson, 116 F.3d 1194 (7th Cir. 1997) 26

Mississippi Republican Executive Committee v. Brooks, 469 U.S. 1002 (1984) 5, 6, 11

Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004); *cert. denied*, 2004 WL 2072975 (No 04-175, Nov. 8, 2004) 6, 14, 15, 25

N.A.A.C.P. v. City of Columbus, S.C., 850 F.Supp. 404 (D. S.C. 1994), *aff'd with modifications*, 33 F.2d 52 (4th Cir. 1994) 28

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) 6, 10

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (*en banc*) 26

Old Person v. Cooney, 230 F.3d 1113 (9th Cir. 2000) 28

Oregon v. Mitchell, 400 U.S. 112 (1970) 7, 11

Printz v. U.S., 521 U.S. 898 (1997) 7

Sanchez v. Bond, 875 F.2d 1488 (10th Cir. 1989) 28

Smith v. Salt River Project Agr. Imp. and Power District, 109 F.3d 586 (9th Cir. 1997) 27

Solomon v. Liberty County Commissioners, 221 F.3d 1218 (11th Cir. 2000) 27

Tennessee v. Lane, __ U.S. __, 124 S.Ct. 1978 (2004) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Thornburg v. Gingles, 478 U.S. 39 (1986) ..... *passim*

U.S. v. Blaine County, Montana, 363 F.3d 897 (9th Cir. 2004) ..... *passim*

U.S. v. Marengo County Commission, 731 F.2d 1546 (11th Cir. 1984) 11, 15

U.S. v. Morrison, 529 U.S. 598 (2000) 6, 10

Uno v. City of Holyoke, 72 F.3d 973 (1st Cir. 1995) 26

Whitcomb v. Chavis, 403 U.S. 124 (1971) ..... *passim*

White v. Regester, 412 U.S. 755 (1973) ..... *passim*

Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (*en banc*) 21, 22, 23, 25

STATUTES

Section 2 of the Voting Rights Act (42 U.S.C. § 1973) .... *passim*

Section 4 of the Voting Rights Act (42 U.S.C. § 1973b) 2, 22

Section 5 of the Voting Rights Act (42 U.S.C. § 1973c) ..... *passim*

CONSTITUTIONAL PROVISIONS

Fourteenth and Fifteenth Amendments to the U.S. Constitution ..... *passim*

LEGISLATIVE HISTORY

H.R. No. 89-439, 89th Cong., 1st Sess. 1965, reprinted in 1965 U.S.C.CA.N. 2437 14

Sen.Rep. No. 97-417, 97th Congr., 2d Sess. 1982, reprinted in 1982 U.S.C.C.A.N. 177 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

JOURNAL AND LAW REVIEW ARTICLES

Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amend ment*, 34 Hastings Law Journal 1 (1982)..... 28

OPINIONS BELOW

Blaine County, Montana seeks review of the opinion of the U.S. Court of Appeals for the Ninth Circuit. *U.S. v. Blaine County, Montana*, 363 F.3d 897 (9th Cir. 2004); App. 1-36. The Ninth Circuit's Order denying Blaine County's Petition for Rehearing *En Banc* is reproduced at App. 79. Findings of Fact and Conclusions of Law and Order of the U.S. District Court for the District of Montana, neither reported nor appearing in Westlaw, District Court No. CV-99-0122-PMP (D. Mont. Mar. 21, 2002), is reproduced at App. 37-63. The accompanying Judgment of the District Court is reproduced at App. 64-65. The Order by the U.S. District Court for the District of Montana denying Blaine County's Motion for Summary Judgment, 157 F.Supp.2d 1145 (D. Mont. 2001), is reproduced at App. 66-78.

JURISDICTION

The opinion for which review is sought was entered on April 7, 2004, and the Order denying Blaine County's Petition for Rehearing *En Banc* of that decision was entered on September 7, 2004. Pursuant to Supreme Court Rule 13.3, this Petition is filed timely within 90 days of the entry of that latter Order. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the judgment of the Ninth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth and Fifteenth Amendments to the U.S. Constitution (App. 80-81) are involved in this case.

STATUTORY PROVISIONS INVOLVED

Section 2 of the VRA (42 U.S.C. § 1973) (App. 82); Section 4 of the VRA (42 U.S.C. § 1973b) (App. 83-93); and Section 5 of the VRA (42 U.S.C. § 1973c) (App. 93-95) are involved in this case.

STATEMENT OF THE CASE

Blaine County, Montana is a rural county in north-central Montana, bordering Canada. It is approximately 60 miles east to west and 90 miles north to south, consisting of approximately 4,638 square miles. It is the ninth largest of Montana's 56 counties. Within the southeastern quadrant of Blaine County is the Fort Belknap Reservation, some small part of which carries over into neighboring Phillips County to the east. Approximately 83 percent of the American Indians who live in Blaine County reside within the boundaries of that Reservation. Although members of the Assiniboine native people and the Gros Ventre native people reside there, the federally recognized tribe to which members of both groups have been assigned by the United States Government is the Fort Belknap Tribe.

According to the 2000 Census, the total population of Blaine County is 7,009, of which 3,180 are "American Indians," constituting 45.4 percent of the total population,

while 3,685 are "White," constituting 52.6 percent of the total population. American Indians of voting age, that is, over 18 years, number 1,834, constituting 38.8 percent of the voting age population (VAP), whereas Whites number 2,805, constituting 59.4 percent of the VAP. Figures available at the time of trial indicate that Blaine County is economically the poorest county in the nation's poorest State.

Prior to June 17, 2002, in accordance with Montana Statute, Blaine County's Board of Commissioners was comprised of three full-time commissioners, each of whom was required to reside in a different residential district, elected for six-year staggered terms with one commissioner being elected every even-numbered year in November, coinciding with federal elections. Though the commissioners must each reside in different residential districts, they are required to be elected at-large, by a majority vote. The two political parties in the County, the Republican and the Democrat, conduct primary elections in June, which are also at-large elections in which the plurality winner advances to the November general election. Democrat candidates dominate Blaine County Commissioner elections.

On November 16, 1999, the United States filed suit in the U.S. District Court for the District of Montana against Blaine County, Montana, its County Commissioners, and its Clerk and Recorder, in their official capacities, alleging that Blaine County's at-large election of County Commissioners violated Section 2 of the VRA and requesting the creation of a majority-minority single member district. On January 3, 2000, Blaine County answered. On January 31, 2001, Blaine County filed its Motion for Summary Judgment, seeking a declaration that Section 2 of the VRA is

unconstitutional facially and as applied, which was denied on August 1, 2001. Meanwhile, on February 28, 2001, the Fort Belknap Tribe and individual American Indian voters had moved to intervene, which motion was denied with regard to the merits of this case, but was later allowed regarding the remedy.

This case was tried to the Court from October 9, 2001, through October 18, 2001. On March 21, 2002, the District Court ruled for the United States and ordered Blaine County to present a plan of remediation. That plan was prepared by Blaine County, and ordered implemented on June 17, 2002, thus creating three single member districts with one super-majority American Indian District, from which Commissioner Plumage was elected in November 2002. On July 12, 2002, Blaine County filed its Notice of Appeal of the merits, but not of the remedy, and of the denial of its Motion for Summary Judgment. The District Court's rulings were affirmed by the Ninth Circuit on September 7, 2004; Blaine County's Motion for Rehearing *En Banc* was denied on April 7, 2004. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. WHETHER SECTION 2 IS CONSTITUTIONAL AS APPLIED HERE IS AN EXTREMELY IMPORTANT QUESTION OF FEDERAL LAW WITH FAR-REACHING FEDERALISM IMPLICATIONS THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Ninth Circuit's holding that it was bound by this Court's summary affirmance in *Mississippi Republican Party v. Brooks* conflicts with the Second Circuit Court of Appeals.

Whether Section 2 of the VRA, which prohibits facially neutral at-large elections in political subdivisions not covered by Section 5, is constitutional has not been decided by this Court.

This Court summarily affirmed *Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984), which found that Section 2 is facially constitutional, in *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984). The Ninth Circuit held that it was bound by that decision. *Blaine County*, 363 F.3d at 904; App. 10-11. The Ninth Circuit conceded that, if intervening doctrinal developments suggested that reliance on *Brooks* is no longer warranted, it would not be bound (App. 11), but held that "there have been no [such] doctrinal developments." *Id.* at 904; App. 12. By so ruling, the Ninth Circuit ignored the "doctrinal developments" set out in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny (*Boerne* through *Lane*).[1]

---

[1] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *Kimel v. Florida Board of*

(Continued on following page)

The Second Circuit, however, followed *Boerne* through *Lane*, holding that "[t]he [Supreme] Court has since 1997 introduced an entirely new framework for analyzing the scope of Congress' power under Section 5 of the Fourteenth Amendment." *Muntaqim v. Coombe*, 366 F.3d 102, 119 (2d Cir. 2004); *cert. denied*, 2004 WL 2072975 (No. 04-175, Nov. 8, 2004). In those cases, "the Court introduced a standard that is 'more rigorous than the standard of review applied in earlier Section Five [of the Fourteenth Amendment] cases, such as *Katzenbach v. Morgan*.'" *Id.* at 120. *See also Farrakhan v. Washington*, 359 F.3d 1116, 1124 (9th Cir. 2004) (Kozinski, J. dissenting from denial of rehearing *en banc*) ("Despite a 1984 case [citing *Brooks*] summarily affirming a district court decision upholding its constitutionality . . . Section 2's constitutionality remains an open question.").

Moreover, members of this Court have cautioned that Section 2's constitutionality remains an open question: *Johnson v. De Grandy*, 512 U.S. 997, 1028-1029 (1994) (Kennedy, J. concurring in part and in judgment); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J. dissenting). *See also Bush v. Vera*, 517 U.S. 952 (1996) (O'Connor, J. concurring) ("In the 14 years since enactment of § 2(b) . . . [we have] never directly addressed its constitutionality"). *Id.* at 991; *and, generally*, *Holder v. Hall*, 512 U.S. 874, 891-945 (1994) (Thomas, J. concurring, joined by Scalia, J.).

Regents, 528 U.S. 62 (2000); *U.S. v. Morrison*, 529 U.S. 598 (2000); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); and *Tennessee v. Lane*, ___ U.S. ___, 124 S.Ct. 1978 (2004).

B. Whether Congress exceeded its authority under the Enforcement Powers is a critical issue implicating the foundation of Federalism set out in the U.S. Constitution.

The federal government is a "government of enumerated powers." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). Thus, States retain sovereignty over matters not so delegated. This "residual state sovereignty [is] implicit . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'" *Printz v. U.S.*, 521 U.S. 898, 919 (1997). "[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are . . . overridden by the power to enforce the Civil War Amendments by 'appropriate legislation.'" *City of Rome v. U.S.*, 446 U.S. 156, 179 (1980). But "[l]egislation which alters the meaning [of those Amendments] cannot be said to be enforcing [those] Clause[s]." *Boerne*, 521 U.S. at 519. "[T]he Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections." *Oregon v. Mitchell*, 400 U.S. 112, 124-125 (1970) (Black, J., announcing the judgment of the Court). Thus, when Congress does not "enforce" those Amendments, but rather defines them, it impinges on powers reserved to the States, violating the Constitution and principles of federalism incorporated therein.

This Court should grant this Petition to answer this "open question" and to decide whether Congress has impinged on the sovereignty of the States by exceeding the

powers conferred by the Fourteenth and Fifteenth Amendments in amending Section 2 of the VRA.

II. THE NINTH CIRCUIT'S ANALYSIS OF CONGRESSIONAL POWER UNDER THE ENFORCEMENT CLAUSES OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. Section 2 of the VRA is "prophylactic legislation" because it proscribes facially neutral conduct.

The Fourteenth and Fifteenth Amendments prevent only purposeful, invidious discrimination by state actors. *City of Mobile Alabama v. Bolden*, 446 U.S. 55, 65 (1980). "Congress' power under § 5 . . . extends only to 'enforcing' the provisions of the Fourteenth Amendment," a power that is solely "remedial." *Boerne*, 421 U.S. at 519. "Congress' § 5 authority is appropriately exercised only in response to state transgressions" of the Constitution. *Garrett*, 531 U.S. at 368. Hence, facially neutral at-large elections violate the Fourteenth and Fifteenth Amendments only if adopted or maintained for the invidious purpose of diluting the voting strength of minority voters. *Bolden*, 446 U.S. at 66.

In 1982, in direct response to *Bolden*, Congress amended Section 2 and prohibited at-large elections that purportedly dilute the voting strength of minority groups, thereby proscribing facially neutral conduct. *Boerne* through *Lane* set forth the tests applied by this Court to determine whether such a prophylactic enactment is "appropriate legislation" as that term is used in the

Enforcement Clauses of the Fourteenth and Fifteenth Amendments.

B. Prophylactic legislation must be a congruent and proportionate response to an identified history of a widespread pattern of purposeful discrimination.

For prophylactic legislation to be "appropriate legislation" to enforce the Fourteenth and Fifteenth Amendments, "there must be congruence and proportionality between the means used and the needs to be achieved." *Boerne*, 521 U.S. at 530. The "appropriateness of remedial measures must be considered in light of the evil presented." *Id.* "[T]he constitutional propriety of [such legislation] must be judged with reference to the historical experience it reflects." *Id.* at 525.

Thus, prophylactic legislation is "appropriate when there is reason to believe that the laws affected by the congressional enactment have a significant likelihood of being unconstitutional" given the "historical experience" of past unconstitutional discrimination that it "reflects." *Id.* at 532. Thus, where "'jurisdictions with a demonstrable history of intentional racial discrimination create the risk of purposeful discrimination,' Congress could 'prohibit changes that have a discriminatory impact' in those jurisdictions." *Id. Accord Florida Prepaid*, 527 U.S. at 647.

Therefore, Congress cannot enact "appropriate" Section 5 legislation unless it has "identified a history and pattern of unconstitutional State transgressions." *Garrett*, 531 U.S. at 368. When dealing with a nationwide prophylactic remedy, Congress must identify a history of "widespread and persisting deprivation of constitutional rights" that

the legislation is aimed at preventing. *Florida Prepaid*, 527 U.S. at 64 (citing *Boerne*, 521 U.S. at 526); *accord Morrison*, 529 U.S. at 626-627; *Garrett*, 531 U.S. at 368).

For example, *Morrison* held that the Violence Against Women Act was "different from the previously upheld remedies in that it applies uniformly throughout the Nation," 529 U.S. at 626, instead of being "directed only to the State where the evil found by Congress existed" or "directed only to the States in which Congress found that there had been [unconstitutional] discrimination." *Id.* 627. *Morrison* found that the conduct complained of "does not exist in all the states, or even most states." *Id.*[2] *Accord Hibbs,* which found that Congress had identified a widespread pattern of unconstitutional gender stereotyping among "the States," *Hibbs*, 538 U.S. at 730, which is a "nationwide problem" that "Congress had already tried unsuccessfully to address," which was "difficult and intractable" and regarding which "previous legislative attempts had failed." *Id.* at 737.[3]

Properly summarized, the "three-part 'congruence and proportionality' test[,] established in *Boerne* [through *Lane*]," requires that a reviewing court:

> (1) identify "with some precision the scope of the constitutional right at issue," *Garrett*, 531

---

[2] Evidence regarding 21 States was not sufficient for nationwide application. *Id.* at 665-666 (Breyer, J. dissenting).

[3] Likewise, *Lane* held that "Congress learned that many individuals in many States across the country, were being excluded from courthouses . . . by reason of their disabilities," *Lane*, 124 S.Ct. at 1990, revealing "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 1988-89.

> U.S. at 365; (2) determine whether Congress identified a history and pattern of unconstitutional conduct by the States; and (3) if so, analyze whether the statute is an appropriate, congruent and proportional response to that history and pattern of unconstitutional treatment. *Garrett*, 531 U.S. at 374; *see Boerne*, 521 U.S. at 520.

Miller v. King, 384 F.3d 1248, 1269 (11th Cir. 2004).

C. The Ninth Circuit ignored *Boerne* through *Lane* and created its own tests.

Even though it held that it was bound by *Brooks*, the Ninth Circuit considered the constitutionality of Section 2 and found it facially constitutional. *Blaine County*, 363 F.3d at 905-909; App. 13-22.[4] In doing so, however, the Ninth Circuit did not employ the analysis required by *Boerne* through *Lane*, but instead placed primary reliance on *City of Rome v. United States*, *supra* (upholding Section 5's results test for retrogressive voting changes in jurisdictions subject to Section 5); *Oregon v. Mitchell*, *supra* (upholding a nationwide ban on literacy tests); *U.S. v. Marengo County Commission*, 731 F.2d 1546 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); and *Major v. Treen*, 574 F.Supp. 325 (E.D. La. 1983). *Blaine County*, 363 F.3d at 908-909; App. 19-22. All were decided prior to *Boerne*. As a result the Ninth Circuit

[4] The Ninth Circuit mischaracterized Blaine County's argument. Blaine County did not contend that Section 2 is facially unconstitutional because it is overinclusive, but rather that Section 2 is unconstitutional as applied to at-large voting in political subdivisions not covered by Section 5.

created its own tests that conflict with this Court's decisions in *Boerne* through *Lane* and the Eleventh Circuit's decision in *Miller v. King, supra*.

1. The Ninth Circuit failed to identify the scope of the constitutional right at issue.

The Ninth Circuit refused to identify the scope of the constitutional right targeted by Section 2.

2. The Ninth Circuit held that a history of unconstitutional conduct by the States is irrelevant.

The Ninth Circuit held that no examination of the history before Congress of alleged unconstitutional conduct by the States was necessary because "section 2 'avoids the problem . . . entirely by its own self-limitation' [rendering] nationwide application of this provision [] undoubtedly constitutional. Sen. Rep. No. 97-417 at 43 (1982)."[5] *Blaine County*, 363 F.3d at 906; App. 16. Essentially, the Ninth Circuit held that, by the application of the totality of circumstances test, Section 2 prohibits only at-large election systems that violate the Fourteenth or Fifteenth Amendments. Thus, the Ninth Circuit conflicts with *Bolden*, which held that the application of those factors does not establish the intent required for a finding

[5] Sen. Rep. No. 97-417, 97th Congr., 2d Sess. 1982, reprinted in 1982 U.S.C.C.A.N. 177.

of unconstitutionality. *Bolden*, 446 U.S. at 71-72.[6] Moreover, the Ninth Circuit's ruling conflicts with *Boerne* through *Lane*.

3. The Ninth Circuit held that upholding a nationwide ban on literacy tests *a fortiori* renders Section 2 constitutional.

The Ninth Circuit held that, because Section 2's totality of the circumstances test renders Section 2 "more limited than the nationwide literacy test ban upheld in *Mitchell*," *Mitchell* is dispositive of Section 2's constitutionality. *Blaine County*, 363 F.3d at 906; App. 16. This analysis ignores the requirements of *Boerne* through *Lane* that a court must analyze the nature and extent of the history of unconstitutional conduct identified by Congress, not simply analogize to a purportedly similar remedy that was upheld.

Moreover, in upholding the ban on literacy tests, this Court searched for and found the type of evidence the Ninth Circuit refused to seek out here. Specifically, this Court found that Congress had determined that "the inevitable effect of [literacy tests is to] den[y] the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education." *Mitchell*, 400 U.S. at 235 (Brennan concurring). Congress found that literacy tests "are vague, arbitrary, hypertechnical or unnecessarily difficult, and have little, (if any), bearing upon the capacity

[6] The Ninth Circuit's holding is even more problematic in light of its holding that only two of the nine tests in the totality of the circumstances test need be proved. See discussion Section III.

to cast an intelligent ballot," leading Congress to determine that "[t]he inescapable conclusion is that these tests were not conceived as and are not designed to be bona fide qualifications in any sense but are intended to deprive Negroes of the right to register to vote." H.R. No. 89-439, 89th Cong., 1st Sess. 1965, reprinted in 1965 U.S.C.CA.N. 2437 at 2444. Furthermore, there is "a fundamental distinction between State action that inhibits an individual's right to vote and State action that affects the political strength of various groups that compete for leadership in a democratically governed community." *Bolden*, 466 U.S. at 83 (Stevens, J. concurring).[7]

The Ninth Circuit's analysis also conflicts with that of the Second Circuit in *Muntaqim*, 366 F.3d at 124-125, which applied the proper analysis. There, the Court held that "by banning *all* [race] neutral devices that 'interact with social and historical conditions to cause inequality,'" Congress, by enacting Section 2, "chose a blunt tool to address the problem it identified," which was the "use of various dilution schemes by certain states to avoid the strictures of the VRA." *Id.* at 124-125 (emphasis in original) *Muntaqim* held that, as applied to felony disenfranchisement laws, Section 2 is constitutionally "too attenuated" because of its "prohibition of *any* felony disenfranchisement law enacted at *any* time in *any* state that 'results' in

[7] "That distinction divides ... into two different categories 'governed by entirely different constitutional considerations.'" *Id.* at 83. "In the first category are poll taxes and literacy tests that deny individuals access to the ballot." *Id.* In the other category is Section 2, which "draws into question a political structure that treats all individuals as equals but adversely affects the political strength of a racially identifiable group." *Id.* at 84.

the abridgement of the right to vote on account of race." *Id.* at 125 (emphasis in original)

The Ninth Circuit's ruling conflicts with this Court's rulings in *Boerne* through *Lane* and the Second Circuit's ruling in *Muntaqim*.

4. The Ninth Circuit, while purporting to do so, did not analyze any history of nationwide voting discrimination.

The Ninth Circuit held that even if it were required to inquire into legislative history, "Congress had sufficient evidence of discrimination in jurisdictions not covered by Section 5 to warrant a nationwide application" of Section 2. *Blaine County*, 363 F.3d at 907; App. 17. The Ninth Circuit relied on a single statement from the 1982 Senate Report and the Eleventh Circuit's pre-*Boerne Marengo County* decision. First, the Ninth Circuit quoted from Sen. Rep. 97-41 at 42, n. 16:

> The hearing record before this committee and the House committee includes testimony as to the existence of discriminatory practices outside the covered jurisdictions, including cases already adjudicated against various non-covered jurisdictions.

Blaine County, 363 F.3d at 907; App. 17. Thus, the Ninth Circuit relied "entirely [on] [an] isolated sentence[] clipped from . . . [a] legislative report[]," a practice soundly condemned by this Court in *Kimel*, 528 U.S. at 89.

In *Marengo County*, the Eleventh Circuit held that "Congress did find evidence of substantial discrimination outside [covered] jurisdictions," relying on the same

solitary legislative statement as the Ninth Circuit did here. *Marengo County*, 731 F.2d at 1559. Based on this faulty foundation, the Ninth Circuit concluded:

> In sum, "Congress [had] explored with great care the problem of racial discrimination in voting," *Garrett*, 431 U.S. at 373, and established an "undisputed record of racial discrimination." *Fla. Prepaid*, 527 U.S. at 640. . . . Thus, we conclude that Congress did not exceed its Fourteenth and Fifteenth Amendment enforcement powers by applying section 2 nationwide.

Blaine County, 363 F.3d at 907; App. 17-18.

Had the Ninth Circuit, in accordance with *Boerne* through *Lane*, properly examined the history on which Congress relied, it would have found that there was no evidence of a widespread pattern of purposeful voting discrimination outside jurisdictions subject to Section 5 of the VRA. In fact, voting discrimination outside jurisdictions subject to Section 5 was virtually ignored:

> Because Section 2 applies in scope to the entire Nation, there is the necessity of demonstrating that the "exceptional" circumstances found in *Katzenbach* to exist in the covered jurisdictions in fact permeated the entire Nation. . . . There has been *no such evidence offered during either the House or Senate Hearing*. Indeed, the subject of *voting discrimination outside the covered jurisdictions has been virtually ignored* during the hearings in each chamber. . . . In the *total absence of such evidence*, it is impossible for Congress to seriously contend that the permanent, nationwide change proposed in the standard for identifying civil rights violations is a "remedial" effort.

Sen. Rep. No. 97-417 at 171 (Report of Subcommittee on the Constitution) (emphasis supplied).

Moreover, assuming *arguendo* that a widespread pattern of purposeful discrimination in voting had been identified in Section 5 covered jurisdictions, the extremely limited number of such jurisdictions fails to demonstrate a similar pattern in non-covered jurisdictions. There are only nine covered States: Alaska, Arizona, Texas, Louisiana, Mississippi, Alabama, Georgia, South Carolina and Virginia.[8] These are confined to one region of the country, the Deep South, except Arizona and Alaska, which were covered in 1975. *Id.*[9] While "confine[ment] to those regions of the country where voting discrimination had been most flagrant" is not necessarily essential in all cases, such "limitations ... tend to ensure Congress' means are proportionate to ends legitimate ... ." *Boerne*, 521 U.S. at 532-533. Lack of such confinement or other narrow tailoring "is particularly incongruous" when there is, as here, "scant support for the predicate unconstitutional conduct that Congress intended to remedy." *Florida Prepaid*, 527 U.S. at 646.

With such scant support here for application beyond a few southern States, it "simply cannot be said that many of the acts of infringement affected by the congressional enactment [in jurisdictions not subject to Section 5] have a significant likelihood of being unconstitutional." *Id.* *Accord Farrakhan*, 359 F.3d at 1123 (Kozinski, J. dissenting) ("Enforcement legislation should be geographically

---

[8] App. 96-102 (http://www.usdoj.gov/crt/voting/sec_5/covered.htm). Three counties in Virginia have "bailed out." *Id.*

[9] A few covered counties exist in seven additional States. *Id.*

targeted when the threat of violation varies from place to place.") (citing *Morrison*).

Thus, there is simply no historical support for the proposition that at-large voting in jurisdictions not subject to Section 5 is substantially likely to have been adopted or maintained to discriminate against racial minority groups. The Ninth Circuit's failure to so rule, given the nonexistent historical record, places it in conflict with this Court's rulings in *Boerne* through *Lane*.

D. The Ninth Circuit ruled that *City of Rome* is dispositive of the constitutionality of Section 2.

The Ninth Circuit, relying on *City of Rome* held that "Section 5 of the VRA could constitutionally be applied to electoral procedures that only had discriminatory results and were not motivated by discriminatory intent" because "requiring proof of intent would cause 'the perpetuation of earlier, purposeful racial discrimination regardless of whether the practices they prohibited were discriminatory only in effect.'" *Blaine County*, 363 F.3d at 907-908; App. 18-19. Therefore, the Ninth Circuit concluded that "[i]f section 5's results test is constitutional, the same must be true of section 2's results test." *Id.* at 908; App. 19.

This holding places the Ninth Circuit in conflict with *Boerne* through *Lane*. This Court has distinguished *City of Rome* by explaining that *City of Rome* held only that "since 'jurisdictions with a demonstrable history of intentional racial discrimination . . . create the risk of purposeful discrimination,' Congress could [constitutionally] 'prohibit [voting] changes that have a discriminatory impact' in

those jurisdictions." *Boerne,* 521 U.S. at 532. However, because Section 2 applies nationwide to the adoption or maintenance of voting devices that have a discriminatory impact on account of race or color, irrespective of the history of the unconstitutional voting conduct of any particular jurisdiction, *City of Rome* has no application to Section 2. Section 2 must be upheld, if possible, not by application of *City of Rome*, but by application of *Boerne* through *Lane.*

E. The Ninth Circuit held that Congress' desire to avoid the difficulty and divisiveness of constitutional proof was sufficient justification for Section 2's enactment.

The Ninth Circuit held that Congress' motivation in adopting Section 2 was a sufficient basis for upholding the constitutionality of Section 2. *Blaine County*, 363 F.3d at 907-908; App. 17-18.

Congress had enacted Section 2 originally to mirror the Fifteenth Amendment and believed that Section 2, like the Fifteenth Amendment, did not require proof of purposeful discrimination, which Congress believed was difficult and divisive. Sen. Rep. 97-417 at 36-37. *Bolden*, which Congress believed had been decided wrongly, required such proof. *Bolden*, 446 U.S. at 66. Therefore, Congress sought to return the constitutional analysis to what it believed had been in effect before *Bolden*:

> This amendment is designed to . . . *restore*[] the legal standards, based on the *controlling Supreme Court precedents . . . prior to* the litigation involved in *Mobile v. Bolden.*

Sen. Rep. 97-419 at 2. (emphasis supplied).

Sen. Rep. 97-417 at 36-37, on which the Ninth Circuit relied, establishes that Congress amended Section 2 because it believed that proving that at-large voting was adopted or maintained to dilute minority voting strength was difficult and divisive, not because it possessed a history demonstrating that at-large voting was substantially likely to be unconstitutional:

> The main reason [for enacting the 1982 amendment] is that . . . the *[constitutional] test asks the wrong question* . . . [I]f an electoral system operates today to exclude blacks or Hispanics from a *fair chance* to participate, then the matter of what motives were in an official's mind . . . is of the most limited relevance.
>
> * * *
>
> Second, the Committee has heard persuasive testimony that the intent test is *unnecessarily divisive* because it involves charges of racism on the part of the individual officials or entire communities.
>
> * * *
>
> [3] Third, the intent test will be an *inordinately difficult burden* for plaintiffs in most cases. (emphasis supplied)

Boerne through *Lane* does not recognize difficulty, divisiveness, or subjective fairness of constitutional proof as a proper foundation for congressional enactment of prophylactic legislation. Congress may not prohibit facially neutral conduct simply because it believes that proving such conduct unconstitutional is difficult or divisive. Nowhere in the legislative history is there any discussion of evidence of purposeful discrimination in voting that even approaches that which was before Congress in 1965

or even in 1975. In amending Section 2, Congress interpreted the Fourteenth and Fifteenth Amendments as it thought *Bolden* should have. Under *Boerne* through *Lane*, Congress has no such power. Thus, the Ninth Circuit's holding to the contrary conflicts with *Boerne* through *Lane*.

This Court should grant this Petition to resolve this conflict.

III. THE NINTH CIRCUIT HELD THAT SECTION 2 DOES NOT REQUIRE PROOF OF A MINORITY GROUP'S UNEQUAL OPPORTUNITY TO PARTICIPATE IN THE POLITICAL PROCESS.

In enacting the 1982 amendment to Section 2, Congress intended to "codify" the "results test" applied in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973). Sen. Rep. 97-417 at 2, 20-21, 28, 32-33 (1982).[10] Congress also sought to codify *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), which applied *Whitcomb* and *White*. *Id.* 23, 28, n.113. Thus, any Section 2 ruling must apply these cases. The Ninth Circuit did not. Instead, relying on a footnote in *Thornburg v. Gingles*, 478 U.S. 39, 47-48, fn. 15 (1986), the Ninth Circuit held:

> As *Gingles* explained, "the most important Senate Report factors bearing on § 2 challenges . . . are the 'extent to which minority group members

[10] "Congress . . . revised Section 2 to . . . establish as the relevant legal standard the 'results test' applied by this Court in *White v. Regester* . . . and by other federal courts before *Bolden*." *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

> have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.'" In fact, *Gingles* expressly stated that [the other] Senate factors "are supportive of but *not essential to*, a minority voters claim." (emphasis in original)

Blaine County, 363 F.3d at 915; App. 35. *See also Id.* at 903; App. 10. There are nine Senate Factors.[11] By holding that Senate Factors 2 and 7 alone, irrespective of the other factors, constitute proof of a Section 2 violation, the Ninth Circuit's ruling conflicts with *Whitcomb*, *White*, and *Zimmer*, and *Johnson v. De Grandy*, 512 U.S. 997 (1994) and *Georgia v. Ashcroft*, 539 U.S. 461 (2003), discussed below.[12] Specifically, the Ninth Circuit held that an unequal opportunity to elect a minority candidate, caused by racially polarized voting, was dispositive of a Section 2 violation. *Blaine County*, 363 F.3d at 915-916, *relying on Gingles*, 478 U.S. at 47-48.

Whitcomb, *White*, and *Zimmer* all incorporated by Congress into Section 2, held that, not only must white bloc voting "cancel out" a cohesive minority group's votes, but there must exist lack of equal opportunity to participate in the political process.[13] *Whitcomb* held that actionable vote

---

[11] The so-called "Senate Factors" represent no more than an attempt by Congress to list some of the factors that it understood had been required by the Courts in *Whitcomb*, *White*, and *Zimmer*. Sen. Rep. 97-417 at 28-29. These factors are reproduced in App. 103-104.

[12] Factor 2 is racially polarized voting, whereas 7 is the extent of election of minority candidates.

[13] Relying on *Whitcomb*, Section 2 likewise requires proof that minority groups "have less opportunity than other members of the electorate to *participate in the political process* ***and*** *to elect* representatives of their choice." 42 U.S.C. § 1973(b). (emphasis supplied).

dilution was present in an at-large voting system only where there existed "evidence and findings" that minority voters "had less opportunity . . . than other [voters] to [both] *participate* in the political process *and elect* legislators of their choice:"

> The mere fact that one interest group or another . . . has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies, where, as here, there is no indication that this segment of the population is being denied *access* to the political system.

403 U.S. at 149, 154-155. (emphasis supplied) *White* and *Zimmer* required proof of both elements. 412 U.S. at 765, and 485 F.2d at 1306. Moreover, under Section 2, racially polarized voting and lack of minority candidate success, both relating to opportunity to elect, are only two of the nine factors identified by Congress. App. 103-104. The remaining seven factors, which must be examined pursuant to *Whitcomb*, *White*, and *Zimmer*, relate to opportunity to participate in the political process.

Furthermore, *Gingles*, upon which the Ninth Circuit relied, has been distinguished or overruled for its overemphasis on factors 2 and 7. Justice O'Connor sharply criticized the *Gingles* plurality for its narrow focus on the opportunity to elect, asserting that the "results test reflected in *Whitcomb* and *White* requires an inquiry into the extent of the minority group's opportunities to participate in the political processes." 478 U.S. at 98 (O'Connor, J. concurring in judgment). The Court must instead "adhere to the approach outlined in *Whitcomb* and *White* and followed with some elaboration in *Zimmer* and other cases in the Courts of Appeals prior to *Bolden*," *Id.* at 99, which requires "consider[ation of] all relevant factors

bearing on whether the minority group has 'less opportunity . . . to participate in the political process *and* to elect representative of their choice.'" *Id.* (emphasis in original).

Johnson v. De Grandy, *supra*, reaffirmed *Whitcomb* and *White* and adopted Justice O'Connor's concurrence in *Gingles*. *De Grandy* held that "lack of electoral success is [only] evidence of vote dilution[;] courts *must* examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes." *Id.* 1011-1012 (citing Justice O'Connor in *Gingles*).

Finally, Justice O'Connor, writing for the majority in *Georgia v. Ashcroft*, *supra*, held that, in addition to "the ability of a minority group to elect a candidate," the "other highly relevant factor . . . is the extent to which a minority group's opportunity to participate in the political process" is impaired. *Id.* at 482 (citing O'Connor, J. in *Gingles* and *Whitcomb*, *White*, and *De Grandy*.).

This Court should grant this Petition to resolve this conflict.

IV. THE NINTH CIRCUIT HELD THAT PROOF OF PURPOSEFUL DISCRIMINATION IS IRRELEVANT.

The Ninth Circuit held that proof of purposeful discrimination "has no part in a vote dilution claim" because that "would be divisive[,] . . . would place an impossible burden on the Plaintiffs," and "is contrary to the plain language of section 2's results test." *Blaine County*, 363 F.3d at 912; App. 28. This holding conflicts

with the decisions of this Court and most of the other circuit courts to address this issue.

Whitcomb, White, and *Zimmer*, upon which Section 2 is premised, all required proof of invidious racial bias in the community, which bias interacts with at large voting to dilute the voting strength of a racial minority group. For example, *Whitcomb* required proof of "invidious discrimination . . . [resulting in] less opportunity . . . to participate in the political process. . . . " 403 U.S. at 149. *Accord White,* 412 U.S. at 768; *Zimmer*, 485 F.2d at 1306.

Likewise, *Gingles* requires interaction of at-large voting with "past purposeful discrimination" resulting in vote dilution of a minority group. *See also De Grandy*, 512 U.S. at 1013 (Court must determine whether "a history of persistent discrimination" combined with "bloc-voting behavior portended any dilutive effect."); *Ashcroft*, 539 U.S. at 490 ("The purpose of the VRA is to prevent discrimination in the exercise of the electoral franchise.").

The Second Circuit held that, although Section 2 does not require purposeful discrimination by a State actor in the adoption or maintenance of at-large voting, "it does not follow . . . that Congress . . . also eliminated *White's* requirement that a plaintiff prove that [at-large voting] interacts with racial discrimination in order to establish a [Section 2] claim." *Muntaqim*, 366 F.3d at 117. "In enacting [Section 2,] Congress' decision to retain the words 'on account of race or color' suggests 'a continuing concern for race-based motivation, at least within the electorate." *Id.* at 116. Thus, a violation of Section 2 "requires some demonstrable causal connections between [at-large voting] and purposeful racial discrimination," *Id.* at 118; that is, a "plaintiff must [prove] . . . that racial discrimination has

caused either vote denial or vote dilution," even though the adoption or maintenance of at-large voting was itself not "motivated by racial bias." *Id.*

The majority of the circuits that have considered this issue agree. A Section 2 violation requires evidence that "a combination of public activity and private discrimination have joined to make it virtually impossible for minorities to play a meaningful role in the electoral process." *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850-851 (5th Cir. 1993) (*en banc*).[14] Without proof of "private discrimination," "claims of vote dilution [are no more than] 'a euphemism for political defeat at the polls.'" *Id.* at 851. Section 2 "prohibits those voting systems that have the effect of allowing a community motivated by racial bias to exclude a minority group from participation in the political process." *Nipper v. Smith*, 39 F.3d 1494, 1514 (11th Cir. 1994) (*en banc*). If "the evidence shows the community is not motivated by racial bias . . . then a case for vote dilution has not been made." *Id.* at 1515-1516. Section 2 "explicitly retains racial bias as the gravamen of a vote dilution claim." *Id.* "When racial antagonism is not the cause of an electoral defeat . . . the defeat does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics." *Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995). "Forcing courts to turn a blind eye to other causes of

---

[14] The legislative history provides that Section 2 "confine[s] its application to actual racial discrimination," invalidating "only . . . those election[ ] laws where the court finds that discrimination has, in fact, been proved." Sen. Rep. No. 97-417 at 43.

majoritarian bloc voting . . . facilitates a back-door approach to proportional representation." *Id.*[15]

This Court should grant this Petition to resolve this conflict.

V. THE NINTH CIRCUIT HELD THAT WHETHER MINORITY GROUPS POSSESS UNIQUE OR DISTINCTIVE POLITICAL INTERESTS IS IRRELEVANT.

The Ninth Circuit held that "it is actual voting patterns, not subjective interpretations of a minority group's political interests, that informs the political cohesiveness analysis." *Blaine County*, 363 F.3d at 910; App. 24. Thus, the Ninth Circuit held that particularized or unique interests, addressable by the political body in question, are irrelevant to minority political cohesion, conflicting with this Court's decisions and those of other circuits.

To be politically cohesive, minority group voters must possess "*distinctive* minority group interests" that the "selection of a[n] [at-large] electoral structure thwarts." *Gingles,* 478 U.S. at 51 (emphasis supplied). *Accord Whitcomb,* 403 U.S. at 135, fn. 12:

> These [minority voters] [must] have *interests in those areas of substantive law* such as housing

[15] *Accord, Solomon v. Liberty County Commissioners*, 221 F.3d 1218, 1225 (11th Cir. 2000); *Goosby v. Town Board of Hemptstead, N.Y.*, 180 F.3d 476, 493 (2d Cir. 1999), *cert. denied*, 528 U.S. 1138 (2000); *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992); *Milwaukee Branch of N.A.A.C.P. v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997); *Smith v. Salt River Project Agr. Imp. and Power District*, 109 F.3d 586, 595, 595, fn. 7 (9th Cir. 1997) (adopting *Nipper, supra.*).

> regulations, sanitation, welfare programs . . . garnishment statutes, and unemployment compensation, among others, which *diverge significantly from* the interests of *nonresidents of the Ghetto*. (emphasis supplied)

These political interests of minority voters must be "unique," that is, "interests not necessarily shared by other members of the community." *Id.* at 155. This Court "accepted the concept of particularized interests in *Whitcomb* and again in *White*, and in *Bolden*." Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment*, 34 Hastings Law Journal 1, 59 (1982) (cited favorably by *Gingles*, 478 U.S. at 51).

Thus, although "a statistical analysis of voting behavior is highly relevant to the issue of political cohesion, . . . experiences and observations of individuals involved in the political process" are not only "clearly relevant to the question of whether the group is politically cohesive," but such evidence is "required if the court is to identify the presence or absence of distinctive minority group interests." *Sanchez v. Bond*, 875 F.2d 1488, 1493-94 (10th Cir. 1989). *Accord N.A.A.C.P. v. City of Columbus, S.C.*, 850 F.Supp. 404, 418 (D. S.C. 1994), *aff'd* with modifications not relevant here, 33 F.2d 52 (4th Cir. 1994) ("[T]here is nothing to be thwarted" without "distinctive political interests."). Indeed, even the Ninth Circuit earlier agreed with this proposition. *Old Person v. Cooney*, 230 F.3d 1113, 1126 (9th Cir. 2000) (no need to consider elections if there is "no evidence to suggest that . . . these contests . . . actually touched on issues of heightened concern to the [minority] community.").

Section 2 requires political cohesion, not racial cohesion. It does not require election of a minority candidate to a body that cannot advance a purportedly disenfranchised minority group's distinctive political interests. Such a requirement constitutes no more than proportional representation of minorities, a form of political apartheid.

This Court should grant this Petition to resolve this conflict.

CONCLUSION

For all the above reasons, this Court should grant this Petition.

Respectfully submitted,

J. SCOTT DETAMORE, ESQ.
Counsel of Record
WILLIAM PERRY PENDLEY, ESQ.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Dated December 6, 2004

APPENDIX INDEX

Page

Ninth Circuit decision, filed April 7, 2004, 363 F.3d 897 (2004) ..... App. 1

Findings of Fact and Conclusions of Law and Order, Civil Action No. 99-cv-0122 (D.Mont. March 21, 2002) ..... App. 37

Judgment ..... App. 64

Order [denying Blaine County's Motion for Summary Judgment], filed July 23, 2001, 157 F.Supp.2d 1145 (D.Mont. 2001) ..... App. 66

Order denying Petition for Rehearing En Banc, filed Sept. 7, 2004 ..... App. 79

U.S. Const. Amend XIV ..... App. 80

U.S. Const. Amend. XV ..... App. 81

Section 2, Voting Rights Act, 42 U.S.C. § 1973 ..... App. 82

Section 4, Voting Rights Act, 42 U.S.C. § 1973b ..... App. 83

Section 5, Voting Rights Act, 42 U.S.C. § 1973c ..... App. 93

Covered Jurisdictions ..... App. 96

Senate Factors ..... App. 103

363 F.3d 897

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
BLAINE COUNTY, MONTANA; Don K. Swenson, in his official capacity as a member of the Blaine County Board of Commissioners; Arthur Kleinjan, in his official capacity as a member of the Blaine County Board of Commissioners; Victor J. Miller, in his official capacity as a member of the Blaine County Board of Commissioners; Sandra Boardman, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County, Montana, Defendants-Appellants,
v.
Joseph F. McConnell; Franklin R. Perez; Candace D. De Celles; Cheryl Sears; Wesley D. Cochran; Linda M. Buck; Donald L. Knife; Daniel Kinsey; Fort Belknap Community Council, Plaintiff-Intervenors-Appellees.

No. 02-35691.

Argued and Submitted Nov. 4, 2003.
Filed April 7, 2004.

J. Scott Detamore, Lakewood, Colorado, for the appellants.

Lisa Wilson Edwards, United States Department of Justice, Washington, D.C., for the appellee.

Appeal from the United States District Court for the District of Montana; Philip M. Pro, District Judge, Presiding. D.C. No. CV-99-00122-PMP.

Before: WARDLAW, GOULD, and PAEZ, Circuit Judges.

PAEZ, Circuit Judge:

Section 2 of the Voting Rights Act prohibits any voting procedure that results in a denial of the right to vote. 42 U.S.C. § 1973. The United States brought this section 2 action against Blaine County alleging that the County's at-large voting system for electing members to the County Commission prevents American Indians from participating equally in the County's political process. The district court determined that section 2 was a constitutional exercise of Congress's powers under the Fourteenth and Fifteenth Amendments, and that Blaine County's at-large voting system violated section 2. In this appeal, Blaine County challenges both of those rulings.[1] We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I.

Blaine County, located in north central Montana, is vast and sparsely populated. Its 7,009 residents are spread out over 4,638 square miles, which places the County in the top 5 percent of counties nationwide in terms of size. American Indians constitute 45.2 percent of the population and 38.8 percent of the voting age population, while whites make up 52.6 percent of the population and 59.4 percent of the voting age population. The American Indian population is geographically concentrated with 80 percent of the County's American Indians residing on the Fort Belknap Reservation. Despite their geographic concentration, no

[1] Blaine County also argues that the district court improperly admitted the testimony of the United States's expert witnesses. Although we agree that the district court's evidentiary rulings were erroneous in one limited respect, we ultimately conclude that this error was harmless.

American Indian was ever elected to the Blaine County Commission under the at-large voting system.

That system worked as follows. The Blaine County Commission consists of three commissioners, each of whom must reside in one of three different residential districts. Each commissioner is elected by a majority vote of the entire county, not just by voters in the commissioner's residential district. The commissioners serve six-year staggered terms, such that each even-numbered year one commissioner stands for election.

The United States brought this action under section 2 and section 12(d) of the Voting Rights Act of 1965 challenging the County's at-large voting system. The United States sought a declaration that the existing at-large voting system violates section 2. The United States also sought an injunction to prevent the County from using at-large voting in future elections and to require the County to submit a new districting plan for the district court's approval.

The County moved for summary judgment on the ground that section 2 was unconstitutional because it exceeded the scope of Congress's powers to enforce the Fourteenth and Fifteenth Amendments. The district court ruled that section 2 did not exceed Congress's power and denied the motion. *See United States v. Blaine County,* 157 F.Supp.2d 1145 (D.Mont.2001).

The case then proceeded to a court trial. In its post-trial Findings of Fact and Conclusions of Law and Order, the district court determined that Blaine County's system of staggered at-large elections for County Commissioner violated section 2. The court found that American Indian voters were sufficiently geographically compact and

politically cohesive to elect a County Commissioner of their choice, but that Blaine County's white residents voted as a bloc to prevent American Indians from electing their preferred candidates. It then analyzed the totality of the local circumstances, and held that there was (1) a history of official discrimination against American Indians, (2) racially polarized voting, (3) voting procedures that enhanced the opportunities for discrimination against American Indians, (4) depressed socio-economic conditions for American Indians, and (5) a tenuous justification for the at-large voting system. Accordingly, the district court held that the totality of the circumstances weighed in favor of a section 2 violation.

The district court declared that the at-large voting system in Blaine County violated section 2, and enjoined the use of such an election system in the future. It also ordered the County to file an election plan that would remedy the section 2 violation. The district court subsequently adopted the County's proposed remedial plan, which provides for three single-member districts.[2] Blaine County does not appeal the remedy adopted by the district court. However, the County does appeal the district court's ruling that section 2 is constitutional and declaration that Blaine County's at-large voting scheme violated section 2.

II.

As originally enacted in the Voting Rights Act of 1965 ("VRA"), section 2 merely restated the prohibition contained

---

[2] Voters in District 1, which has a majority American Indian voting age population (just over 87 percent), recently elected Blaine County's first American Indian County Commissioner.

in the Fifteenth Amendment.[3] The VRA's most sweeping provision was section 5, which required "covered" jurisdictions with a history of voting discrimination[4] to preclear any change in voting practices or procedures with the United States Department of Justice. 42 U.S.C. § 1973c (1965). The 1965 Act also banned literacy tests in covered jurisdictions, and permitted the federal government to appoint federal registrars and election observers. Shortly after the VRA's enactment, the Supreme Court held in *South Carolina v. Katzenbach* that Congress constitutionally enacted section 5, the limited ban on literacy tests, and the appointment of federal monitors pursuant to its power under the Fifteenth Amendment. 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

The VRA was first amended in 1970 when Congress made the ban on literacy tests nationwide for a five-year period. Although the Supreme Court had held in *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959), that literacy tests were not unconstitutional *per se,* it upheld Congress's power to

---

[3] Section 2 originally provided:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Pub.L. No. 89-110, tit. I, § 2, 79 Stat. 437 (1965).

[4] A jurisdiction was "covered" for purposes of section 5 if it used a literacy or other test for registering or voting and if less than half of its voting age population voted in the 1964 presidential election. The original covered jurisdictions were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and large parts of North Carolina. Daniel Hays Lowenstein and Richard L. Hasen, *Election Law: Cases and Materials* 35 (2d ed.2001).

enact the five-year nationwide ban on literacy tests. *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). Congress again amended the VRA in 1975, making the nationwide literacy test ban permanent and extending the VRA's protections to language minorities.

During the 1970s, voting rights lawsuits increasingly relied on section 2 to remedy voting discrimination. In a series of cases, the Supreme Court and lower courts interpreted section 2 to require plaintiffs to show under the totality of the circumstances that the challenged system operated "to cancel out or minimize the voting strength of racial groups." *White v. Regester,* 412 U.S. 755, 765, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *see also Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir.1973).

However, in 1980, the Court held in *City of Mobile v. Bolden* that Congress intended section 2 to regulate only conduct prohibited by the Fifteenth Amendment. 446 U.S. 55, 60-61, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Because the Fifteenth Amendment only prohibited intentional discrimination, a violation of section 2 required a showing that the challenged procedure was adopted with the intent to discriminate. *Id.* at 62, 100 S.Ct. 1490. That same day, however, the Supreme Court held in *City of Rome v. United States* that section 5's "ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting." 446 U.S. 156, 177, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). Thus, although the Court interpreted section 2 of the VRA to prohibit only purposeful discrimination, the Court recognized Congress's

power to enact legislation that prevented voting procedures that had discriminatory results.

In response to *Bolden* and pursuant to its Fourteenth and Fifteenth Amendment enforcement powers, Congress amended section 2 to clarify that it was a results test. S.Rep. No. 97-417, at 15-16, 39 (1982), U.S.Code Cong. & Admin.News at 177, 192-93. Section 2, as amended by the 1982 Voting Rights Act, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(b), as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

The Supreme Court applied section 2 to multimember districts in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In that case, the Court held that when plaintiffs challenge at-large voting schemes under section 2, they must prove at a minimum that "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.* at 49, 106 S.Ct. 2752. Broken down, this test has three requirements, known as the "*Gingles* factors": (1) compactness; (2) cohesive minority voting; and (3) a bloc voting majority that can usually defeat the minority-preferred candidate. *Id.* at 50-51, 106 S.Ct. 2752.

If the plaintiff establishes these three factors, the court then must consider whether under the totality of circumstances the at-large voting system operates to prevent the minority group from participating equally in the political process and electing representatives of its choice. *Id.* at 44-46, 106 S.Ct. 2752. *Gingles* cited a non-exhaustive list of factors discussed in the Senate Report on the 1982 Amendments that courts should consider in assessing the totality of the circumstances:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 36-37, 106 S.Ct. 2752 (quoting S.Rep. No. 97-417 at 28-29, U.S.Code Cong. & Admin.News at 205-07).

The most important Senate factors in a section 2 challenge to multimember districts are factors 2 (the extent to which elections are racially polarized) and 7 (the extent to which minorities have been elected). *Id.* at 51 n. 15, 106 S.Ct. 2752. The Senate Report's "list of typical factors is neither comprehensive nor exclusive" and "there is no requirement that a particular number of factors be proved, or that a majority of them point one way or the other." *Id.* at 45, 106 S.Ct. 2752. Rather, the ultimate "question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process." *Id.* (internal citations omitted). With this history in mind, we turn to the constitutionality of section 2.

III.

The County contends that Congress exceeded its enforcement powers under the Fourteenth and Fifteenth Amendments when it enacted the 1982 amendments to the VRA. We disagree.

A.

To begin with, Blaine County does not dispute that the Supreme Court summarily affirmed section 2's constitutionality in *Mississippi Republican Executive Committee v. Brooks,* 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984), affirming *Jordan v. Winter,* 604 F.Supp. 807, 811 (N.D.Miss.1984) (3-judge district court). Although the County concedes that the Supreme Court summarily

disposed of the same constitutional challenge that the County raises here,[5] it argues that this summary affirmance is not binding precedent for a federal appellate court.

This contention ignores the well-established rule that the Supreme Court's summary affirmances bind lower courts, unless subsequent developments suggest otherwise. *Hicks v. Miranda,* 422 U.S. 332, 344-45, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). The County suggests that summary dispositions have less precedential value than opinions. Although this is true in the sense that the Supreme Court is more willing to reconsider its own summary dispositions than it is to revisit its prior opinions, this principle does not release the lower courts from the binding effect of summary affirmances.[6] As the Court

---

[5] The jurisdictional statement in *Mississippi Republican Executive Committee* specifically asked "[w]hether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." 469 U.S. at 1003, 105 S.Ct. 416 (Stevens, J., concurring).

[6] The Supreme Court opinion cited by the County for this proposition actually said:

> Although we have noted that our summary dismissals are to be taken as rulings on the merits in the sense that they rejected the specific challenges presented and left undisturbed the judgment appealed from, we have also explained that they do not have the same precedential value as does an opinion of this Court after briefing and oral argument on the merits. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action. . . .

Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 307, 118 S.Ct. 766, 139 L.Ed.2d 717 (1998). Thus, the Supreme Court was referring to the precedential value it accords its own summary dispositions, not denying the binding effect of summary dispositions on the lower courts.

itself has instructed, "inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise." *Miranda,* 422 U.S. at 344, 95 S.Ct. 2281.

There have been no doctrinal developments that suggest we should ignore the Supreme Court's summary affirmance of section 2's constitutionality. While it is true that the Supreme Court has, in a series of recent cases, adopted a congruence-and-proportionality limitation on Congressional authority, this line of authority strengthens the case for section 2's constitutionality. Indeed, in the Supreme Court's congruence-and-proportionality opinions, the VRA stands out as the prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments. Most tellingly, when the Supreme Court first announced the congruence-and-proportionality doctrine in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), it twice pointed to the VRA as the model for appropriate prophylactic legislation. *Id.* at 518, 525-26, 117 S.Ct. 2157. The Court's subsequent congruence-and-proportionality cases have continued to rely on the Voting Rights Act as the baseline for congruent and proportionate legislation. *See Nevada v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 1982, 155 L.Ed.2d 953 (2003) (highlighting the pattern of state constitutional violations that supported Congress's enactment of the VRA); *Bd. of Trs. v. Garrett,* 531 U.S. 356, 373-74, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (holding that "[t]he contrast . . . is stark" between the evidence supporting the VRA's enactment and the insufficient evidence of state discrimination against the disabled); *United States v. Morrison,* 529 U.S. 598, 626,

120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (pointing to the VRA as legislation that appropriately targeted state constitutional violations, rather than discrimination by non-state actors); *Fla. Prepaid v. Coll. Sav. Bank,* 527 U.S. 627, 638, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999) (comparing the lack of evidence of state patent infringements with the "undisputed record of racial discrimination confronting Congress in the voting rights cases"). In sum, "the Court [has] continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *Boerne,* 521 U.S. at 526, 117 S.Ct. 2157. Thus, the congruence-and-proportionality cases support, not undermine, the Supreme Court's summary affirmance of section 2's constitutionality in *Mississippi Republican Executive Committee,* of which we remain bound.

B.

Even if we were free to ignore the Supreme Court's summary affirmance, we would join all of the other "lower courts [that] have unanimously affirmed [section 2's] constitutionality." *Bush v. Vera,* 517 U.S. 952, 991, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (O'Connor, J., concurring).[7] Blaine County, however, offers two different reasons

[7] Justice O'Connor cited the following cases that have upheld section 2's constitutionality: *United States v. Marengo County Comm'n,* 731 F.2d 1546, 1556-1563 (11th Cir.1984), *cert. denied* 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311; *Jones v. Lubbock,* 727 F.2d 364, 372-75 (5th Cir.1984); *Shaw v. Hunt,* 861 F.Supp. 408, 438 (E.D.N.C.1994) (3-judge district court), *aff'd in part, rev'd in part,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *Prosser v. Elections Bd.,* 793 F.Supp. 859, 869 (W.D.Wis.1992) (3-judge district court); *Wesley v. Collins,* 605 F.Supp.

(Continued on following page)

for why section 2 lacks congruence and proportionality. It argues that there is no widespread evidence of purposeful voting discrimination that would justify nationwide application of section 2. It also contends that section 2's results test is impermissible because the Constitution only prohibits intentional discrimination. We consider each argument in turn.

1. Nationwide Application

The sweeping preclearance requirements of section 5 of the VRA only apply to jurisdictions with a recent history of using voting tests and devices to deny the right to vote. *See Katzenbach,* 383 U.S. at 328-331, 86 S.Ct. 803. The Supreme Court has looked favorably upon section 5's limited geographic scope in its congruence-and-proportionality cases. *See City of Boerne,* 521 U.S. at 533, 117 S.Ct. 2157. In light of section 5's limited geographic scope, the County contends that Congress exceeded its constitutional power by not placing similar geographic limitations on section 2 of the VRA and by failing to document a nationwide pattern of purposeful voting discrimination that would justify nationwide application of section 2. We disagree for several reasons.

First, legislation enacted under § 5 of the Fourteenth Amendment need not have geographic restrictions. *City of Boerne,* 521 U.S. at 533, 117 S.Ct. 2157 ("This is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions or egregious predicates."). Such

---

802, 808 (M.D.Tenn.1985), *aff'd* 791 F.2d 1255 (6th Cir.1986); *Sierra v. El Paso Indep. Sch. Dist.,* 591 F.Supp. 802, 806 (W.D.Tex.1984); *Major v. Treen,* 574 F.Supp. 325, 342-49 (E.D.La.1983) (3-judge district court).

limitations only "tend to ensure" proportionality when Congress "pervasively prohibits constitutional state action." *Id.*

Unlike section 5 of the VRA, section 2 does not engage in such a pervasive prohibition of constitutional state conduct. The two sections of the VRA are dramatically different in scope. Section 5 is an extraordinary measure, which requires covered jurisdictions to submit every change in their voting procedures to the Department of Justice for preclearance. Section 5 thus places the burden of proof on the state or locality, not on the party challenging the voting procedure. *Katzenbach,* 383 U.S. at 328, 86 S.Ct. 803. Because section 5 imposes such a significant burden on state and local governments, Congress had reason to limit its application to jurisdictions with a recent history of pervasive voting discrimination.

Section 2 is a far more modest remedy. The burden of proof is on the plaintiff, not the state or locality. This burden is significant; Congress heard testimony that section 2 cases are some of the most difficult to litigate because plaintiffs must usually present the testimony of a wide variety of witnesses – political scientists, historians, local politicians, lay witnesses – and sift through records going back more than a century.[8] In contrast to section 5, section 2's results test makes no assumptions about a

---

[8] *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong. 368 (1982) [hereinafter *"VRA Hearings"*] (statement of Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union Foundation) ("[W]e tried . . . virtually every kind of civil rights lawsuit there is . . . and there's no question that a vote dilution suit is the most difficult. . . . The optimum dilution suit, quite frankly, was nothing less than a presentation of the complete racial history of the jurisdiction.").

history of discrimination. Plaintiffs must not only prove compactness, cohesion, and white bloc voting, but also satisfy the totality-of-the-circumstances test. *Gingles,* 478 U.S. 30, 48-50, 106 S.Ct. 2752, 92 L.Ed.2d 25. Because section 2 "avoids the problem of potential overinclusion entirely by its own self-limitation," nationwide application of this provision is undoubtedly constitutional. S.Rep. No. 97-417, at 43 (1982) [hereinafter "1982 Senate Report"].

Second, the Supreme Court has upheld the VRA's nationwide ban on literacy tests, even though literacy tests are not *per se* unconstitutional. *Mitchell,* 400 U.S. at 112, 91 S.Ct. 260. Section 2 is more limited than the literacy test ban upheld in *Mitchell* because it does not label any procedure as impermissible *per se.* Rather, a procedure only fails section 2's test if, given the totality of the circumstances, it prevents minorities from participating effectively in the political process or electing candidates of their choice.

Third, after the Supreme Court's recent decision in *Nevada v. Hibbs,* it is clear that Congress need not document evidence of constitutional violations in every state to adopt a statute that has nationwide applicability. 123 S.Ct. at 1980. In *Hibbs,* the Supreme Court recognized that the "important shortcomings of *some* state policies" provided sufficient evidence of constitutional violations by the states. *Id.* (emphasis added). As Justice Scalia's dissent so vigorously pointed out, however, Congress failed to document evidence of unconstitutional discrimination in *all* fifty states. *Id.* at 1985 (Scalia, J., dissenting). Thus, we decline to hold that Congress had to find evidence of unconstitutional voting discrimination by each of the fifty states in order to apply section 2 nationwide.

Finally, even if nationwide evidence were a prerequisite to national utilization of section 2, Congress had before it sufficient evidence of discrimination in jurisdictions not covered by section 5 to warrant nationwide application. As the Senate Report noted, "[t]he hearing record before this committee and the House committee includes testimony as to the existence of discriminatory practices outside of the covered jurisdictions, including cases already adjudicated against various non-covered jurisdictions." 1982 Senate Report at 42 n. 161, U.S.Code Cong. & Admin.News at 220 n. 161. Indeed, the Eleventh Circuit concluded that "Congress did find evidence of substantial discrimination outside [covered] jurisdictions." *Marengo County Comm'n,* 731 F.2d at 1559.[9]

In sum, after "Congress [had] explored with great care the problem of racial discrimination in voting," *Garrett,* 531 U.S. at 373, 121 S.Ct. 955, and established an "undisputed record of racial discrimination," *Fla. Prepaid,* 527 U.S. at 640, 119 S.Ct. 2199, it was justified in applying section 2 nationwide. As Justice O'Connor has said, Congress amended section 2 in 1982 to address the "sad reality that there still are some communities in our Nation where racial politics do dominate the electoral process." *Vera,* 517 U.S. at 992, 116 S.Ct. 1941 (O'Connor, J., concurring).

---

[9] Blaine County quibbles about the sufficiency of the evidence in the congressional record supporting discrimination in non-covered jurisdictions. It argues, for example, that most of the reported cases cited by the United States ended in consent decrees, and that such settlements are not a reliable indicator of purposeful voting discrimination because of the financial incentives to settle. Although we cannot ascertain the motives of jurisdictions that settled these voting rights cases, a consent decree requires court approval, making it unlikely that spurious claims of purposeful voting discrimination would be settled through an enforceable consent decree.

Thus, we conclude that Congress did not exceed its Fourteenth and Fifteenth Amendment enforcement powers by applying section 2 nationwide.

2. The Results Test

Next we consider whether Congress exceeded its authority when it adopted section 2's results test, thereby repudiating any intent requirement. In *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), the Supreme Court held that the Fourteenth and Fifteenth Amendments only prohibit purposeful discrimination. Therefore, the County argues, section 2's results test lacks congruence and proportionality because it does not require intentional discrimination and thereby prohibits electoral procedures that are constitutional under *Bolden.*

The most obvious problem with the County's argument is that on the exact same day that the Court issued its opinion in *Bolden,* the Court also held in *City of Rome v. United States* that section 5 of the VRA could constitutionally be applied to electoral procedures that only had discriminatory results and were not motivated by discriminatory intent. 446 U.S. 156, 173-178, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980) ("We hold that, even if § 1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment], outlaw voting practices that are discriminatory in effect."). As the Court explained, Congress justifiably adopted an effects test because requiring proof of intent would cause "the perpetuation of earlier, purposeful racial discrimination, regardless of whether the practices they

prohibited were discriminatory only in effect." *Id.* at 177, 100 S.Ct. 1548.

Thus, under *City of Rome,* Congress can prohibit voting requirements that have discriminatory results. If section 5's results test is constitutional, the same must be true of section 2's results test. In fact, the constitutionality of section 2's results test is more certain because section 2 is far narrower than section 5's preclearance requirements.

Additionally, Congress thoroughly considered the practical and constitutional implications of the results test, and reasonably concluded that an intent test would not effectively prevent purposeful voting discrimination. As the Fifth Circuit viewed the congressional evidence, "[e]mpirical findings by Congress of persistent abuses of the electoral process, and the apparent failure of the intent test to rectify those abuses, were meticulously documented and borne out by ample testimony." *Jones v. City of Lubbock,* 727 F.2d 364, 375 (5th Cir.1984) (quoting *Major v. Treen,* 574 F.Supp. 325, 342-49 (E.D.La.1983) (3-judge district court)). After listening to over 100 witnesses and at least 27 days of testimony in the Senate alone, Congress concluded that an intent requirement would undermine efforts to eliminate invidious discrimination. Even when courts applied a results test prior to *Bolden,* section 2 litigation was extremely difficult,[10] and very few cases were pursued each year. *Bolden,* however, "brought efforts to overcome discriminatory barriers to minority

[10] *VRA Hearings, supra* note 8, at 796-97 (statement of Armand Derfner, The Joint Center for Political Studies).

political participation almost to a complete halt."[11] Of the three voting rights lawyers that testified before Congress, not one had filed a voting rights lawsuit since the Court had issued its decision in *Bolden*.[12] The record before the Senate reflected that, after *Bolden*, district courts had vacated judgments of vote dilution and, on retrial under the intent test, discriminatory voting mechanisms withstood judicial scrutiny.[13] The intent test was hopelessly ineffective because those who enacted ancient voting requirements could not be subpoenaed from their graves, and present-day legislators were protected from testifying about their motives by legislative immunity.[14] Moreover, cities and counties did not maintain legislative histories, especially from fifty or a hundred years ago.[15] There was also testimony that the intent test was ineffective because purposeful discrimination could be hidden underneath false trails planted in the legislative record.[16] The intent test had the added burden of placing local judges in the difficult position of labeling their fellow public servants "racists." And the intent test's divisiveness threatened to

---

[11] *VRA Hearings*, *supra* note 8, at 462 (prepared statement of Hon. Henry L. March, Mayor of the City of Richmond, Va.); *see also id.* at 640 (statement of David Walbert, Former Law Professor, Emory University) ("I have not filed a dilution case since *Mobile*.").

[12] *VRA Hearings*, *supra* note 8, at 813 (prepared statement of Armand Derfner).

[13] 1982 Senate Report, *supra*, at 37-39.

[14] 1982 Senate Report, *supra*, at 36-37.

[15] *VRA Hearings*, *supra* note 8, at 709 (Letter from the Lawyers' Committee for Civil Rights Under Law re: Questions and Answers on the Section 2 "Results" Standard of S.1992).

[16] 1982 Senate Report, *supra*, at 37.

undermine racial progress, thereby worsening purposeful discrimination.[17]

But these difficulties were not the principal justification for rejecting the intent test. As the Senate Report explained:

> The main reason is that, simply put, the test asks the wrong question. In the *Bolden* case on remand, the district court after a tremendous expenditure of resources by the parties and the court, concluded that officials had acted more than 100 years ago for discriminatory motives. However, if an electoral system operates today to exclude blacks or Hispanics from a fair chance to participate, then the matter of what motives were in an official's mind 100 years ago is of the most limited relevance.

1982 Senate Report, *supra,* at 43, U.S.Code Cong. & Admin.News at 221.

After careful consideration, Congress found that the results test would be a carefully crafted measure to remedy purposeful discrimination. Congress examined twenty-three reported cases in which the results test was applied. It found that the test did not prohibit any particular voting procedure *per se,* that it did not assume racial bloc voting, that it was not aimed at achieving proportional representation, that a limited number of cases were filed, and that plaintiffs did not always win. Congress also determined that section 2 is "self-limiting" because of the

---

[17] Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm. & Mary L.Rev. 725, 735 (1998).

numerous hurdles that plaintiffs must cross to establish a vote dilution claim.[18] In fact, calling section 2's test a "results test" is somewhat of a misnomer because the test does not look for mere disproportionality in electoral results. Rather, plaintiffs must establish that under the totality of the circumstances, the challenged procedure prevents minorities from effectively participating in the political process. In sum, we agree with the Eleventh Circuit's view that "Congress conducted extensive hearings and debate on all facets of the Voting Rights Act and concluded that the 'results' test was necessary to secure the right to vote and to eliminate the effects of past purposeful discrimination." *Marengo County Comm'n,* 731 F.2d at 1557. Thus, we hold that the results test is a constitutional exercise of Congress' Fourteenth and Fifteenth Amendment enforcement powers.[19]

IV.

Next, Blaine County challenges the district court's conclusion that its at-large voting system violated section

---

[18] 1982 Senate Report, *supra,* at 32-33.

[19] The County argues that section 2 requires proportional representation, apparently ignoring the statute's plain language: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b). The County also contends that section 2 must contain a sunset provision and an opt-out provision like section 5 of the VRA. Although the Supreme Court has viewed such provisions favorably because of section 5's extraordinary remedy, it has expressly rejected the notion that the Fourteenth Amendment "requires termination dates, geographic restrictions, or egregious predicates." *City of Boerne,* 521 U.S. at 533, 117 S.Ct. 2157. Section 2 therefore need not contain such limitations because it is a narrower provision than section 5 of the VRA.

2. We review for clear error the district court's factual findings related to the vote dilution claim, as well as its ultimate determination that vote dilution exists. *Old Person v. Cooney,* 230 F.3d 1113, 1119 (9th Cir.2000). However, questions of law and mixed questions of law and fact are subject to *de novo* review. *Smith v. Salt River Project,* 109 F.3d 586 (9th Cir.1997). Because the district court did not commit legal error, and its factual findings and ultimate conclusion that vote dilution exists are not clearly erroneous, we affirm.

A.

The County disputes the district court's finding that American Indians were politically cohesive. To be clear, the County does not challenge the district court's finding that American Indians vote cohesively. Indeed, the evidence indisputably shows that American Indians consistently bloc vote. Dr. Theodore Arrington, the United States's expert witness, testified that in all fourteen county-wide elections he examined, American Indian voters exceeded 67 percent cohesion – his threshold for cohesive minority voting. He also found American Indian voter cohesion in 100 percent of 19 elections for the Board of Harlem School District, an area of high American Indian concentration within Blaine County. Even the County's expert witness conceded that American Indians voted cohesively in 100 percent of County Commissioner elections and 95 percent of exogenous elections for county, state, and national offices.[20]

[20] The County's expert witness assumed a racial group was cohesive if its members voted at 60 percent cohesion.

The County argues that the district court nonetheless erred because there was no evidence that American Indian voters have distinct political concerns. The County, however, misconstrues the inquiry for racial bloc voting. As the Supreme Court explained in *Gingles,* "a showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim." 478 U.S. at 31, 106 S.Ct. 2752. Indeed, we have recognized that "proof that the minority has consistently voted differently helps one to ascertain whether the minority group members constitute a politically cohesive unit." *Gomez v. City of Watsonville,* 863 F.2d 1407, 1415 (9th Cir.1988). Thus, the Supreme Court and this court both have held that it is actual voting patterns, not subjective interpretations of a minority group's political interests, that informs the political cohesiveness analysis.

Even if this were a matter of first impression, we would reject Blaine County's proposed standard because it would force courts to second guess voters' understanding of their own best interests. Indeed, the County's argument is not simply that American Indians lack shared interests, but that their shared interests are unfounded. The County, therefore, essentially asks us to deny the validity of American Indian voters' self-professed interests. Were we to do so, we would be answering what is inherently a political question, best left to the voters and their elected representatives. Thus, the district court applied the appropriate legal test for determining whether the American Indian population is politically cohesive, and its findings were well-supported by the record.

B.

Blaine County also challenges the district court's refusal to consider low turnout among American Indian voters as evidence of a lack of political cohesion. We essentially rejected this argument in *Gomez v. City of Watsonville,* 863 F.2d 1407 (9th Cir.1988), holding that "[t]he district court erred by focusing on low minority voter registration and turnout as evidence that the minority community was not politically cohesive." *Id.* at 1416. Despite this unequivocal language, Blaine County suggests *Gomez* left open the possibility that low turnout could prove a lack of cohesiveness if there was evidence to support such a conclusion. At the very least, this is a strained reading of *Gomez* that simply cannot be squared with the plain language of our decision: "The court should have looked only to *actual voting patterns* rather than speculating as to the reasons why many Hispanics were apathetic." *Id.*

Apart from our precedent, Blaine County's suggested approach would undermine section 2's effectiveness. After all, "[l]ow voter registration and turnout have often been considered evidence of minority voters' lack of ability to participate effectively in the political process." *Id.* at 1416 n. 4. Thus, if low voter turnout could defeat a section 2 claim, excluded minority voters would find themselves in a vicious cycle: their exclusion from the political process would increase apathy, which in turn would undermine their ability to bring a legal challenge to the discriminatory practices, which would perpetuate low voter turnout, and so on. Thus, the district court did not err by rejecting low voter turnout as evidence of a lack of political cohesion.

C.

Blaine County also contends that the district court erred in its analysis of white bloc voting because the court did not require white voter cohesion levels to surpass 60 percent. This contention flatly ignores the test laid out in *Gingles* for white bloc voting – "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." 478 U.S. at 49, 106 S.Ct. 2752. Indeed, *Gingles* rejected a blanket numerical threshold for white bloc voting because:

> The amount of white bloc voting that can generally minimize or cancel black voters' ability to elect representatives of their choice . . . will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices . . . ; the percentage of registered voters in the district who are members of the minority group; the size of the district; and, in multimember districts, the number of seats open and the number of candidates in the field.

Id. at 56, 106 S.Ct. 2752 (citations omitted).

Applying the appropriate standard, the district court's factual findings were not clearly erroneous. Dr. Arrington specifically studied whether white voters were usually able to defeat the American Indian-preferred candidate. In five out of seven county-wide elections between an American Indian candidate and white candidate, the American Indian candidate lost despite receiving strong American Indian support. In four out of five contested Democratic primaries for the County Commission, white voters were

able to defeat the American-Indian-preferred candidate. Similar bloc voting patterns were observed in Harlem School Board elections. Accordingly, the district court did not err in finding white bloc voting.

D.

The County also argues that the district court committed legal error by placing greater weight on elections which involved American Indian candidates. In *Old Person,* however, we held that "contests between white and Indian candidates . . . are most probative of white bloc voting." 230 F.3d at 1127; *see also Ruiz,* 160 F.3d at 553 ("*minority v. non minority election* is more probative of racially polarized voting than a *non-minority v. non-minority election*"). Accordingly, we reject the County's argument because it is contrary to our settled precedent.

E.

Next, Blaine County argues that the district court inappropriately relied on Harlem School Board elections to find cohesive voting patterns. But the district court did not rely exclusively, or even mostly, on the Harlem School Board elections. Rather, these elections provided additional evidence of American Indian voter cohesion and white bloc voting. As Dr. Arrington testified, the Harlem School Board elections provide useful evidence of cohesive voting patterns because American Indians make up a substantial percentage of the population of the school district and American Indians have frequently run for positions on the board. The district court did not commit legal error by examining exogenous elections to supplement its analysis of racially cohesive voting patterns in

the at-large county commission elections. *See Citizens for a Better Gretna v. City of Gretna,* 834 F.2d 496, 502 (5th Cir.1987) ("Although exogenous elections alone could not prove racially polarized voting in Gretna aldermanic elections, the district court properly considered them as additional evidence of bloc voting – particularly in light of the sparsity of available data.").

F.

The County also contends that the district court erred by failing to require proof that white bloc voting was the result of racial bias in the electorate. But as we have explained, "proof of groupwide or individual discriminatory motives has no part in a vote dilution claim." *Ruiz,* 160 F.3d at 557. Requiring proof of discriminatory motives among white voters in Blaine County would be divisive and would place an impossible burden on the plaintiffs. *Id.* at 558. Most important, the County's assumption that intentional discrimination among white voters must be shown is contrary to the plain language of section 2's results test. *See Gingles,* 478 U.S. at 43-44, 106 S.Ct. 2752 (holding that section 2 "repudiated" the intent test). Thus, we reject the notion that the district court was required to unearth evidence of discrimination in the white electorate to find a section 2 violation.[21]

---

[21] We reject the County's contention that *Smith v. Salt River,* 109 F.3d 586 (1997), compels a contrary conclusion. Although *Salt River* did hold that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry," we never suggested that discrimination in the electorate must be proven. *Id.* at 595. *Salt River* simply held that there must be a causal connection between a voting requirement and a discriminatory result. *Id.* There is

(Continued on following page)

G.

The County next makes a series of challenges to the district court's determination that there was a history of official discrimination against American Indians. First, it claims the district court here improperly relied on another district court's Findings of Facts and Conclusions of Law in *Old Person v. Cooney,* 230 F.3d at 1129. We disagree. Although the district court pointed to the factual findings in *Old Person* for a detailed description of the history of racial discrimination against American Indians in Montana, it relied on the "extensive testimony" presented here by the United States.

In light of the breadth of this testimony, the district court's factual findings on this issue did not constitute clear error. As the United States's expert witness testified, Montana laws repeatedly discriminated against American Indians' exercise of the franchise.[22] In 1897, for example, the Montana legislature passed a law prohibiting American Indians from voting unless they were government

---

such a connection here: Blaine County's at-large voting system enhances the possibility that a bloc of white voters will prevent American Indians from electing candidates of their choice. In challenges to multimember districts, evidence of racial bloc voting provides the requisite causal link between the voting procedure and the discriminatory result. Once such a connection is shown, nothing in *Salt River* suggests that plaintiffs have the additional burden of proving that white bloc voting is due to discriminatory motives. Accordingly, the district court did not err by declining to inquire into the divisive and irrelevant issue of whether white voters in Blaine County are motivated by discriminatory motives.

[22] Because these discriminatory laws were enacted by the Montana legislature, we find no merit in the County's assertion that the district court improperly relied on evidence of official discrimination by the federal government.

employees or owned a home outside of a reservation.[23] Two years later, the Montana legislature requested that the federal government prohibit American Indians from leaving their reservations.[24] In 1912, the State Attorney General declared that any American Indian who participated in tribal affairs could not participate in general or school board elections. The Montana legislature also passed legislation in 1919 prohibiting the creation of an electoral district within the boundaries of a reservation. Finally, beginning in 1932 and continuing through 1963, the Montana legislature enacted various laws limiting voting to taxpayers, which served to disenfranchise many reservation residents who were exempt from property taxes. In short, we find that the district court's conclusion that there was a history of official discrimination against American Indians in Montana was not clearly erroneous.

H.

Blaine County also challenges the district court's totality-of-the-circumstances analysis on several fronts. First, the County argues that the district court could only look at official discrimination by Blaine County, not the state or federal government. We rejected this exact argument

---

[23] The fact that these laws targeted American Indians undermines the County's contention that the statutes considered by the district court were irrelevant because they were not aimed at American Indian voters.

[24] The County argues that segregation within its borders is merely the result of benign federal policies and choices by American Indians. The Montana legislature's support for a federal law prohibiting American Indians from traveling outside of reservations, as documented in the record, amply supports the district court's contrary conclusion.

in *Gomez,* 863 F.2d at 1418, because this overly narrow interpretation of the first Senate factor "would result in precisely the sort of mechanistic application of the Senate factors that the Senate report emphatically rejects." *Id.*

Next, the County argues in a single sentence that there is no evidence of racially polarized voting. Both sides' experts agreed that American Indians almost always vote cohesively, and Dr. Arrington, the government's expert, testified that white voters frequently vote as a bloc, which precludes American Indians from electing candidates of their choice. Even if reasonable minds could disagree, the County does not explain why the district court's finding was clearly erroneous.

The County contends that there is no evidence that it uses other procedures to discriminate against minority voters. However, the evidence showed that staggered terms prevent American Indians from bullet voting,[25] and

---

[25] When all candidates for a legislative body are elected at-large at the same time, a minority group still has the opportunity to elect a minority-preferred candidate through bullet voting, also known as one-shot voting. Minority voters can concentrate their vote on electing one minority-preferred candidate, while the majority vote will be split among the majority candidates. As the U.S. Commission on Civil Rights explained:

> Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates

(Continued on following page)

the County's enormous size makes it extremely difficult for American Indian candidates to campaign county-wide in at-large elections. Thus, the district court did not commit clear error in finding that Blaine County's electoral procedures enhanced the opportunity for discrimination against American Indians.

The County also argues that there are no socioeconomic differences between American Indians and whites in Blaine County. However, the government's evidence showed that Blaine County's American Indian families are three times more likely than its white families to live below the poverty line. Similar disparities were found in graduation, unemployment, and vehicle-ownership rates. Along the same lines, the County contends that there is no causal link between discrimination and whatever socioeconomic disparities might exist. There was, however, extensive evidence of official discrimination by federal, state, and local governments against Montana's American Indian population.

The County next contends that American Indians are unwilling to run for office. The district court found, however, that American Indians frequently run for the Harlem School Board, which demonstrates that there is a pool of qualified American Indian candidates. American Indians also testified that they were currently unwilling to run for County Commissioner because white bloc voting made it

---

and if the vote of the majority is divided among a number of candidates.

U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* 206-207 (1975). Because Blaine County's at-large elections are staggered, American Indians are prevented from utilizing bullet voting to elect a candidate of their choice to the Blaine County Commission.

impossible for an American Indian to succeed in an at-large election. The County again fails to explain how the district court's finding on this point was clearly erroneous.

The County contends that at-large elections make the county commissioners responsive to voters throughout Blaine County. However, the district court found that Montana does not require at-large elections and that the county government depends largely on residency districts for purposes of road maintenance and appointments to County Boards, Authorities and Commissions. The County does not dispute these findings, and therefore we conclude that the district court did not clearly err in determining that the asserted justifications for having at-large elections were tenuous.

Finally, the County argues that there are no structural barriers that prevent American Indians from voting. Although voter registration barriers would certainly provide evidence that minority voters were prevented from participating in the political process, the absence of such barriers hardly proves that the County's at-large voting system is permissible under section 2.

In short, the district court did not err in its totality of the circumstances analysis.[26]

---

[26] Even if the County persuaded us that the district court had erred with respect to one factor, *Gingles* makes clear that not every Senate factor, or even a majority of Senate factors, must weigh in favor of a vote dilution finding. 478 U.S. at 45, 106 S.Ct. 2752. The County has not convincingly argued that the district court erred in its analysis of a single factor, much less that such an error undermined the district court's ultimate finding of vote dilution to such an extent that the overall vote dilution determination was clearly erroneous. *See id.* at 79, 106 S.Ct. 2752.

V.

The County argues that the district court failed to rule on its objections to the expert testimony of Drs. Arrington, Hoxie, and McCool. Our decision in *Mukhtar v. Cal. State Univ., Hayward,* 299 F.3d 1053 (9th Cir.2002), "require[s] a district court to make *some* kind of reliability determination to fulfill its gatekeeping function" under Federal Rules of Evidence 702. *Id.* at 1066 (emphasis in original). Here, the district court made the necessary reliability determination with respect to Dr. Arrington's testimony and report. After all, the district court explicitly found that race-identified registration lists, utilized by Dr. Arrington, "are consistently accepted methods of data collection for § 2 voting rights cases."[27]

We agree that the district court failed to determine the reliability of portions of Dr. Hoxie's testimony and the entirety of Dr. McCool's expert testimony, despite objections

---

[27] We also hold that the district court's decision to admit Dr. Arrington's testimony did not constitute an abuse of discretion. *See Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). The County challenges Dr. Arrington's use of race-identified registration lists. However, both Dr. Arrington and Dr. Weber, the County's expert, testified that race-identified registration lists are commonly used and acceptable tools for examining racial voting patterns. Indeed, race-identified registration lists are arguably superior to the alternatives, such as the use of census data, because they make no assumptions about registration rates in particular communities. Moreover, the notion that Dr. Arrington's analysis was methodologically flawed is belied by the fact that Dr. Arrington's and Dr. Weber's bivariate ecological regression analysis and homogenous precinct analysis yielded similar results. Finally, Dr. Arrington actually went beyond procedures used in previous section 2 cases and divided his coders into separate groups. Thus, there was no abuse of discretion in admitting Dr. Arrington's testimony and exhibits.

by Blaine County.[28] The district court's decision is not reversible, however, if its failure to make the required reliability determination was harmless. *Mukhtar,* 299 F.3d at 1065.

We conclude that the district court's error was harmless because the tainted testimony was not essential to the district court's ultimate finding of vote dilution. The district court's memorandum decision never specifically cites the testimony of Dr. Hoxie or Dr. McCool. At most, the district court relied on this testimony to find a history of official discrimination, the first Senate factor. But Dr. Hoxie's testimony regarding events between 1844 and 1959, which the County does not challenge, provides independent evidence of official discrimination by the State of Montana.

In any event, the first Senate factor is not critical. As *Gingles* explained, "the most important Senate Report factors bearing on § 2 challenges to multimember districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.'" 478 U.S. at 51 n. 15, 106 S.Ct. 2752. In fact, *Gingles* expressly stated that other factors, such as the first Senate factor, "are supportive of, but *not essential to,* a minority voter's claim." *Id.* Therefore, even if we exclude the tainted testimony, and

---

[28] Because we agree that the district court failed to expressly determine the reliability of Dr. Hoxie and Dr. McCool's testimony, we do not address the County's alternative argument that their testimony should not have been admitted because it was methodologically flawed. However, we note that the County does not challenge Dr. Hoxie's methodology with respect to his examination of the period 1844-1959.

even if we assume that testimony was critical to the district court's analysis of the first Senate factor, we would not disturb the district court's ultimate finding of vote dilution. Accordingly, any *Mukhtar* error here was harmless.

VI.

In sum, we affirm the district court's summary judgment upholding section 2's constitutionality and its declaration that Blaine County's at-large voting system violated section 2.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

* * *

THE UNITED STATES OF AMERICA, Plaintiff, v. BLAINE COUNTY, MONTANA; DON K. SWENSON, ARTHUR KLEINJAN and VICTOR J. MILLER, in their official capacities as members of the Blaine County Board of Commissioners; and SANDRA BOARDMAN, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County, Montana, Defendants.	CV-S-99-122-GF-PMP FINDINGS OF FACT AND CONCLUSIONS OF LAW and ORDER (Filed Mar. 21, 2002)

Plaintiff United States of America commenced this action on November 16, 1999, pursuant to Sections 2 and 12(d) of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973 and 1973j(d), and 28 U.S.C. § 2201. This Court has jurisdiction pursuant to 42 U.S.C. § 1973j(f) and 28 U.S.C. § 1345.

Defendant Blaine County, Montana, is a political and geographical subdivision of the State of Montana. Defendants Don K. Swenson, Arthur Kleinjan and Victor J.

Miller are elected members of the Blaine County Board of Commissioners and are sued in their official capacities in connection with their exercise of the legislative and executive powers of Blaine County. Defendant Sandra Boardman is the Clerk and Recorder of Blaine County and is sued in her official capacity as the Superintendent of Elections for Blaine County.

On May 17, 2001, the undersigned was designated from the District of Nevada to perform the duties of the United States District Judge for the District of Montana for all proceedings including entry of Judgment in this specific case. A bench trial was conducted at Great Falls, Montana, between October 9-18, 2001, and post-trial briefing was completed on January 10, 2002. Based upon the evidence adduced at trial, the Court makes the following Findings of Fact and Conclusions of Law.

FACTUAL BACKGROUND

Blaine County is located in north central Montana. According to the 2000 decennial census, the total population of Blaine County is 7,009 consisting of 3,685 (52.6%) white people, and 3,167 (45.2%) American Indians and Alaskan natives.[1] The total voting age population ("VAP") of Blaine County is 4,722 of whom 2,805 (59.4%) are white and 1,834 (38.8%) are American Indians and Alaskan natives. Most of Blaine County's American Indian population is concentrated on the Fort Belknap Reservation, 80% of which is situated within Blaine County. The Fort

[1] The population data for Indians living in Blaine County includes all persons who identified themselves as American Indians in the 2000 census, whether or not they are members of federally recognized tribes.

Belknap Reservation was created in May 1888, as a permanent home for the Gros Ventre and Assiniboine Indian tribes. *Winters v. United States*, 207 U.S. 564, 565 (1908). Approximately 83% of the American Indians who live in Blaine County reside within the boundaries of the Fort Belknap Reservation.

The Blaine County Board of Commissioners consist of three members, each of whom must reside in one of three different residential districts in the County. The Commissioners are elected at large by a majority vote of the entire County for six-year staggered terms, such that every even-numbered year in November, one of the three Commissioners must stand for election. At-large primary elections are conducted in June, with the plurality winner advancing to the November general election.

In their Complaint, Plaintiff United States alleges that the at-large method of election for the members of the Blaine County Board of Commissioners violates the discriminatory result standard of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a), as amended, (hereinafter "Act").[2] Specifically, Plaintiff United States asserts that the at-large method of election for members of the Blaine County Board of Commissioners results in American Indian citizens having less opportunity than white citizens to participate in the political process and to elect representatives of their choice in violation of Section 2 of the Act. Plaintiff seeks declaratory relief that would declare the existing at-large method of election of the

[2] The Court previously rejected Defendants' challenge to the constitutionality of Section 2's discriminatory result standard and upheld the Act on its face and as applied to American Indians. *United States v. Blaine County, Montana*, 157 F.Supp.2d 1145 (D. Montana 2001).

Board of Commissioners violative of Section 2 of the Act. Plaintiff also seeks injunctive relief which would enjoin Defendants from continuing to use the at-large system in future elections, and would require Defendants to devise and present to the Court a district voting plan that remedies the Section 2 violation.

DISCUSSION

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Therefore, to prevail on the § 2 claim, Plaintiff must prove "'that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [American Indians, a "language minority group" protected by the Act under 42 U.S.C. § 1973aa-1a(e)] in that [their] members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Old Person v. Cooney*, 230 F.3d 1113, 1120 (9th Cir. 2000) (quoting 42 U.S.C. § 1973(b)).

The essence of a § 2 claim is that an "electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). While the results standard does not provide an assurance of success at the polls for minority preferred candidates, it does provide an assurance of a fair process. *Johnson v. De Grandy*, 512 U.S. 997, 1014 (1994).

In *Gingles*, the Supreme Court set out the framework under which a §2 violation should be evaluated. First, the Court determined that §2 is violated when an election mechanism results in discrimination regardless of whether an intent to discriminate existed. The *Gingles* Court went on to state that the "right" question to consider for §2 violations was "whether 'as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice.'" *Gingles*, 478 U.S. at 43-44 (quoting S. Rep. No. 97-417 at 28 (1982)).

The Court specified three preliminary factors to be met in order to find a §2 violation:

(1) The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district;

(2) The minority group must be able to show that it is politically cohesive; and

(3) The minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, such as the minority candidate running unopposed, usually to defeat the minority's preferred candidate.

Gingles at 50-51 (internal citations omitted). It is only after all three *Gingles* factors are met that a "court must decide the ultimate question of vote dilution." *Old Person*, 230 F.3d at 1120 (citing 42 U.S.C. § 1973(b)). In making this determination, the Court must consider whether, under the totality of circumstances, American Indians have been denied an equal opportunity to participate in the political process and to elect representatives of their choice in Blaine County. *Id.*

Drawing from the Senate Judiciary Committee Majority Report that accompanied the bill amending the Voting Rights Act in 1982, the *Gingles* Court cited a non-exhaustive list of factors that are important in any § 2 vote dilution inquiry:

> "1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

"Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

"[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

"[9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

Gingles, 478 U.S. at 36-37 (quoting S. Rep. No. 97-417 at 28-29 (1982) *reprinted in* U.S.C.C.A.N. 177, 206-07).

In considering the "totality of the circumstances" factors, no requirement exists that "'any particular number of facts be proved, or that a majority of them point one way or the other.'" *Gingles*, 478 U.S. at 45 (quoting S. Rep. at 29). Rather, § 2 "requires the court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson* and *Burns*, 'minimized or cancelled.'" S. Rep. at 29 n. 118 (referencing *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)); and *Burns v. Richardson*, 384 U.S. 73, 88 (1996).

A. THE *GINGLES* FACTORS

1. *Gingles One:* Compactness.

The first *Gingles* prong requires a showing that the number of American Indians in Blaine County "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. The parties agree, and the evidentiary record demonstrates, that the American Indian VAP in Blaine County is of sufficient size and concentration to be a majority of the voters using traditional districting principals [sic] to draw at least one single-member district within Blaine County. Indeed, approximately 38.6% of Blaine County's voting age population is comprised of American Indians, most of whom reside on or near the Fort Belknap Reservation.

2. *Gingles Two:* Political Cohesiveness.

The second *Gingles* prong requires that Plaintiff prove that American Indians in Blaine County are politically cohesive. The third *Gingles* prong requires that Plaintiff prove that despite the political cohesion of American Indians in Blaine County, the white majority in Blaine County usually votes as a bloc "to defeat the minorities preferred candidate." *Gingles*, 478 U.S. at 50-51. Taken together, the second and third prongs measure the extent to which voting in Blaine County is racially polarized. No mathematical formula exists for determining the existence of polarized or bloc voting for purposes of § 2. Instead, the *Gingles* Court stated that legally significant racially polarization exists "where there is a consistent relationship between [the] race of the voter and the way in which the voter votes . . . or to put it differently, where [minority] voters and white voters vote differently." *Gingles*, 478 U.S. at 53 n.21 (internal citations omitted).

Plaintiff's expert, Dr. Theodore Arrington, defined politically cohesive voting as occurring when 67% or more of a minority group votes for the same candidate, or votes for candidates of their minority group over white candidates. Applying a two-third majority measure for political cohesion, Dr. Arrington's examination of five county commissioner primary elections, four general county commissioner elections, three elections for state representative, one congressional primary and one congressional general election, demonstrated that 67% of American Indians who voted, voted for the same candidate.[3] Indeed,

[3] During trial, the Court reserved ruling as to the admissibility of Plaintiff's Exhibits 1-21. Defendants objected to the Exhibits on the grounds that Dr. Arrington's use of race-identified registration lists

(Continued on following page)

for these fourteen elections, Dr. Arrington concluded that an average of 89% of American Indians voted for the same candidate. Dr. Arrington also found the same cohesive voting pattern for American Indians in his examination of nineteen Harlem School Board elections.

The findings of Defendants' expert, Dr. Ronald Webber [sic], are not inconsistent with those of Dr. Arrington. Employing a 60% standard for measuring cohesion among American Indian voters, Dr. Webber [sic] found that American Indians voted cohesively in 100% of the county commissioner elections he examined, and in approximately 95% of the exogenous elections he examined.

Plaintiff argues that *Old Person* requires a showing that American Indians were political [sic] cohesive in more than 70% of the examined elections in order to meet the second *Gingles* prong. However, Plaintiff's reliance on *Old Person* for this proposition is misplaced because the parties in *Old Person* stipulated to political cohesion at the time of trial. *Old Person*, 230 F.3d at 1121. Nevertheless, the percentages of cohesion evidenced through the testimony of Drs. Arrington and Webber [sic] , persuades this Court that a "significant number" of American Indian voters in

---

found through "coders" who determined the race of voters, was not a permissible methodology under Rule 702 of the Federal Rules of Evidence. The Court disagrees. Race-identified registration lists were used by experts in the same area in *Old Person v. Cooney*, 230 F.3d at 1121. Indeed, Dr. Arrington relied on the *Old Person* registration lists for his analysis of the 1990, 1992, 1994 and 1996 elections in Blaine County. Additionally, both Drs. Arrington and Weber testified that race-identified registration lists are consistently accepted methods of data collection for § 2 voting rights cases. The Court, therefore, overrules Defendant's objection and admits Exhibits 1 through 21.

Blaine County usually vote for the same *candidates. Gingles*, 478 U.S. at 56.

Defendants' contention that low voter turnout by American Indians in Blaine County's primary elections defeats Plaintiff's claim that American Indians are politically cohesive is not persuasive. Indeed, an argument similar to that advanced by Defendants was rejected by the Ninth Circuit Court of Appeals in *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1080 (1989). *Gomez* requires that this Court look to actual voting patterns rather than speculating as to why there is a low turnout of American Indian voters in Blaine County's primary elections. Moreover, the evidence adduced at trial is simply inadequate to enable this Court to make conclusive factual findings as to reasons for low voter turnout by American Indian citizens of Blaine County.

The Court also rejects Defendants' argument that American Indians in Blaine County are not politically cohesive because they lack group interests that are distinct from the white citizens of Blaine County. The evidence presented at trial shows the contrary. Similarly, Defendants' argument that American Indians lack distinctive political interests because the Blaine County Commission plays only a limited role in their lives is not supported by the evidence adduced at trial. The evidentiary record demonstrates that some issues considered by the Blaine County Commission may have limited direct affect on the Fort Belknap Reservation and that certain distinctive political interests on the part of American Indians in Blaine County stem from socio-economic disparities and geographic and racial separation. However, it is not necessary for the Court to consider such factors where, as

here, compelling evidence regarding the voting behavior of the American Indian community in Blaine County so forcefully demonstrates political cohesion. *Gomez*, 863 F.2d at 1416.

3. *Gingles Three:* White Bloc Voting

Under the third *Gingles'* prong, "the court must determine whether the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances . . . usually to defeat the minority's preferred candidate" *Old Person*, 230 F.3d at 1121-22 *(quoting Gingles*, 478 U.S. at 51). The *Gingles* Court recognized the amount of white bloc voting which would cause the cancellation of the minority voter's ability to elect a candidate would vary depending upon the voting district at issue based on certain factors, including:

- the nature of the allegedly dilutive electoral mechanism;
- the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting;
- the percentage of registered voters in the district who are members of the minority group;
- the size of the district;
- and, in multimember districts, the number of seats open and the number of candidates in the field.

Gingles, 478 U.S. at 56. Thus, the third prong "asks a predominately historical question – that is, whether the

Section 2 majority bloc usually defeats the minority's preferred candidate." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 555 (9th Cir. 1998).

The Ninth Circuit Court of Appeals has applied a two-step process for ascertaining white bloc voting. "The process requires the court (1) to determine the candidate preferred by Indian voters; and (2) to determine whether whites voted as a bloc to defeat the Indian-preferred candidate." *Old Person*, 230 F.3d at 1122. *See also Ruiz*, 160 F.3d at 550; and *Valladolid v. City of Nat. City*, 976 F.2d 1293, 1296-97 (9th Cir. 1992). To determine who is the minority-preferred candidate in a particular election, a court must ask "which candidate receives the most votes from minority voters." *Id.* at 552 (citing *Lewis v. Alamance County*, 99 F.3d 600, 614 (4th Cir. 1996); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1018-19 (2d Cir. 1995); and *Clarke v. City of Cincinnati*, 40 F.3d 807, 810 n.1 (6th Cir. 1994)). However, a specific percentage is not required. *Ruiz*, 160 F.3d at 552 ("Therefore, we hold that a candidate who receives sufficient votes to be elected if the election were held only among the minority group in question qualifies as minority-preferred."). Additionally, a general election candidate does not need to be treated as the minority preferred candidate "when another candidate receiving greater support in the primary failed to reach the general election." *Id.* (quoting *Niagara Falls*, 65 F.3d at 1019). Finally, the minority preferred candidate may be a non-minority. *Ruiz*, 160 F.3d at 551.

Defendants argue that bloc voting and cohesion are the same and thus, the same standard should apply for both. Defendants point to a *Gingles* Court statement that "a showing that a significant number of minority group

members usually vote for the same candidate is one way of proving the ***political cohesiveness*** necessary to a vote dilution claim . . . and, consequently, establishes ***minority bloc voting*** within the context of § 2." *Gingles*, 478 U.S. at 52 n.18 (emphasis added). Further, Defendants cite to the *De Grandy* Court's use of cohesion and bloc voting interchangeably in a sentence. 512 U.S. at 1011 ("The [Gingles] Court thus summarized the three now-familiar *Gingles* factors (compactness/numerousness, ***minority cohesion or bloc voting***, and ***majority bloc voting***) as 'necessary preconditions' . . . for establishing vote dilution.") (emphasis added). Finally, Defendants offer *Teague v. Attala County* where the Fifth Circuit used the two phrases interchangeably:

> The existence of ***racial bloc voting*** pertains to a vote dilution claim in two ways. ***Bloc voting by blacks*** tends to prove that the black community is ***politically cohesive.*** In other words, it shows that blacks as a group tend to support the same candidate as they would elect if voting in a single member, black majority district. Naturally, however, ***politically cohesive voting behavior*** will not elect the minority's candidate of choice if the ***majority group*** is similarly ***politically cohesive. Bloc voting*** by a ***white majority*** tends to prove that blacks will generally be unable to elect representatives of their choice.

92 F.3d 283, 287-88 (5th Cir. 1996) (emphasis added).

However, regardless of how courts use the words interchangeably, the standards for *Gingles'* prongs two and three are distinctly different. Political cohesion can be demonstrated by "showing that a significant number of minority group members usually vote for the same candidates." *Gingles,* 478 U.S. at 56. White bloc voting on the

other hand requires the majority to vote in such a way that the majority "normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Id.* These standards are distinct and are employed for separate determinations.

In *Old Person,* the Ninth Circuit Court of Appeals held that "[e]lections between white and minority candidates are the most probative in determining the existence of legally significant white bloc voting." 230 F.3d at 1123-24; *see also Gingles,* 478 U.S. at 52, 61 n. 30, and 68. Moreover, "contests, occurring in the challenged districts and involving the same public offices subject to challenge, [are] more probative than election contests for other offices." *Old Person,* 230 F.3d at 1125. The trial record establishes a total of seven American Indian versus white elections were held in Blaine County, with American Indian voters voting cohesively for the Indian candidate. In five of the seven elections, the Indian candidate cohesively supported by American Indians in Blaine County was defeated by white bloc voting. The other two elections were congressional elections involving American Indian candidate Bill Yellowtail and in one of those, Yellowtail's margin of victory in Blaine County was 51% of the total votes casts after receiving support from 98% of the American Indian voters and 32% of white voters. The Court finds these seven elections represent strong evidence of legally significant polarized voting in Blaine County.

Evidence adduced at trial also establishes that the democratic party dominates local politics in Blaine County. Since at least 1986, Blaine County has not elected a single Republican to the office of County Commissioner, County Assessor, County Clerk and Recorder, Sheriff, County

Coroner, County Attorney, Justice of the Peace, Superintendent of Schools, State Senator or State Representative. This evidence supports Plaintiff's argument that where a single political party dominates the political process, minority voters cannot have a meaningful opportunity "to participate in the political process and to elect representatives of their choice" unless they are able achieve electoral success within the primary process. *White v. Regester,* 412 U.S. 755, 767 (1973). Of the five contested democratic primary elections for County Commission conducted since 1980, American Indian voters cohesively supported a preferred candidate. In all but one of those primary elections, the preferred American Indian candidate lost because of white bloc voting. The Court finds these results compelling evidence of legally significant polarized voting.

The only other elections in Blaine County where American Indian candidates have competed for non-Tribal offices are nineteen exogeneous elections for the Harlem School Board. These elections demonstrate overwhelmingly that American Indians cohesively supported Indian candidates over white candidates and that white voters preferred white candidates over Indian candidates, again supporting this Court's finding of political cohesion and white bloc voting.

The analysis of American Indian and white voting behavior in Blaine County generated through bivariate ecological regression analysis and homogeneous precinct analysis offered by the parties is entirely sufficient to support the Court's conclusion regarding polarized voting. *Gingles,* 478 U.S. at 52-53, 61-62. There is, however, additional non-statistical evidence of racial polarization relevant to the second and third prongs of *Gingles* which warrants consideration.

The systematic failure of the Blaine County Commission to appoint American Indians to boards, authorities and commissions illustrates how racial separation makes it more difficult for Indian candidates to solicit white votes. Evidence in this regard shows that out of eighty-five appointments in 1997, ninety-four appointments in 1998, eighty-five appointments in 1999 and eighty-five appointments in 2000, only three Commission appointments to local boards, authorities and commissions were filled by American Indians. Additionally, many social, civic, political and religious organizations are separated along racial lines in Blaine County making it more difficult for American Indians to establish contacts with potential white voters. Housing patterns in Blaine County which are generally divided along racial lines with the majority of American Indians living on the Fort Belknap Reservation and the majority of white residents living elsewhere, contributes to this division. Finally, Plaintiff presented evidence that American Indian candidates typically receive an "icy" reception from white citizens in Blaine County when they attempt to campaign door-to-door thereby inhibiting American Indian participation in what Defendants characterize as an expected form of campaigning throughout Blaine County.

On the basis of the foregoing, the Court concludes that Plaintiff has satisfied the three threshold *Gingles* factors by demonstrating that (1) the population of American Indians in Blaine County "is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) American Indians in Blaine County are "politically cohesive;" and (3) the white majority in Blaine County "votes sufficiently as a bloc to enable it – in the absence of special circumstances . . . usually to defeat

the minority's preferred candidate." *Gingles,* 478 U.S. at 50-51.

B. TOTALITY OF THE CIRCUMSTANCES

Having determined that Plaintiff has satisfied the three *Gingles* factors, the Court must determine the ultimate question of vote dilution by assessing whether, under the totality of circumstances, American Indians have been denied an equal opportunity to participate in the political process and to elect representatives of their choice in Blaine County. *Old Person* 230 F.3d at 1120. In making this assessment, the Court begins by considering the pertinent Senate factors specified in *Gingles:*

> These factors are not to be applied woodenly; as the Senate Judiciary Committee noted, and the Supreme Court has reiterated, "'the question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality,' and on a 'functional' view of the political process." (citations omitted)

Old Person, 230 F.3d at 1129.

The Senate Factors

The first Senate factor calls upon the Court to consider the extent of any history of official discrimination in Montana, and more particularly in Blaine County, that touched the right of American Indians in Blaine County to register, to vote, or otherwise to participate in the democratic process. The history of discrimination against American Indians by the federal government and the State of Montana from the 1860's until as recently as 1971 was chronicled in detail in the Findings of Fact and Conclusions

of Law entered by the Honorable Paul G. Hatfield, United States District Judge, in *Old Person v. Cooney,* No. CV-96-004-GF, entered October 27, 1998, and upheld by the United States Court of Appeals for the Ninth Circuit in *Old Person.* 230 F.3d at 1129. Additionally, Plaintiff presented extensive testimony at trial relating to the history of official discrimination against American Indians in the State of Montana and specifically in Blaine County. Notwithstanding recent progress in reducing discrimination against American Indians in the State of Montana and in Blaine County, this Senate factor focuses on a prior history of discrimination. The Court finds that Plaintiff has met its burden under the first Senate factor.

The second Senate factor requires the Court to consider the extent to which elections in Blaine County are racially polarized. This Court has already made a finding that the evidence at trial demonstrates that despite political cohesion of American Indian voters in Blaine County, the white majority usually votes as a bloc to defeat the Indian-preferred candidate. The consistent relationship between the race of the voter in Blaine County and the way in which that voter votes, meets the racial polarization standard. *Gingles,* 478 U.S. at 53 n. 21. Therefore, the second Senate factor is met.

The third Senate factor involves the extent to which Blaine County has used voting practices or procedures that may enhance discrimination against American Indians. The Court finds this factor is established by Plaintiff as a result of Blaine County's use of the at-large county commission voting system. The at-large system has consistently resulted in the inability of American Indians to elect candidates of their choice.

The fourth Senate factor relating to whether American Indians have been denied access to a candidate slating process is not applicable in this case.

The fifth Senate factor concerns the extent to which American Indians bear the effects of discrimination in areas which hinder their ability to participate effectively in the political process. In considering this issue, the Court must look beyond the bounds of Blaine County. *Gomez,* 863 F.2d at 1418 (stating that a court must look beyond the city, county or district where the election took place and instead look at the statewide effects of discrimination). The evidence at trial establishes that Blaine County is the poorest county in Montana. That unfortunate fact makes the fifth Senate factor more difficult to assess. The Court finds, however, that Plaintiff has demonstrated that past discrimination against American Indians in Montana and in Blaine County has resulted in depressed socio-economic conditions which have hindered the ability of American Indians in Montana to participate fully in the political process. *Old Person,* 230 F.3d at 1129.

The sixth Senate factor looks to whether political campaigns in Blaine County have been characterized by overt or subtle racial appeals. Plaintiff introduced evidence of the removal of or damage to campaign signs erected on behalf of American Indian candidates in Blaine County. However, this evidence is not sufficient to demonstrate that political campaigns in Blaine County are characterized by overt or subtle racial appeals.

The Supreme Court held the seventh Senate factor, the extent to which American Indians have been elected to public office in Blaine County, is a highly probative indication of impermissible vote dilution. *Gingles,* 478 U.S. at

48-49 n.15; *Old Person,* 230 F.3d at 1128. The evidence presented at trial is compelling that American Indian electoral failure in Blaine County is nearly total. Blaine County has a total of thirteen countywide offices which include three county commissioners, a county assessor, a county clerk and recorder, a county clerk of the district court, a county coroner, a county attorney, two justices of the peace, a county sheriff, a county superintendent of schools, and a county treasurer. The trial record shows that With the exception of the election of Charles Hay as Blaine County Sheriff, no American Indians has ever been elected or appointed to any of the 13 elective offices in Blaine County.[4] The evidence at trial further establishes that several American Indians residing in Blaine County are qualified to serve on the Blaine County Commission. Nonetheless, only three candidates have run for the County Commission throughout its history, and none has done so in the past ten years. By comparison, electoral success of American Indians to the Harlem School Board has demonstrated that a pool of American Indian candidates exists and is willing to run for elective office where a fair chance of being elected exists.

In evaluating the evidentiary record with respect to the foregoing Senate factors, the Ninth Circuit Court of Appeals determined that "[t]he most important of the Senate factors are racial polarization, 'the extent to which voting in the elections of the state or political subdivision is racially polarized,' and proportional representation, 'the

[4] The evidence is inconclusive as to whether Sheriff Hay's Indian ancestry was known to the majority of voters of Blaine County, but the evidence also shows that his ancestry was not an issue at the time of his election.

extent to which [American Indians] have been elected to public office in the jurisdiction.' A third important factor is 'proportionality,' the relation of the number of majority-Indian voting districts to the American Indians' share of the relevant population." *Old Person,* 230 F.3d at 1128-29 (quoting *Gingles,* 478 U.S. at 48 n. 15 and citing *De Grandy,* 512 U.S. at 1014 n.11). Although the *Old Person* Court did not specify the origin of the proportionality requirement, the *De Grandy* Court cited § 1973(b) as the reason to include an analysis of proportionality in the totality of circumstances inquiry. *De Grandy,* 512 U.S. at 1000. Regardless of the origin of the standard, Plaintiff has shown significant polarized voting and a lack of proportional representation which strongly supports Plaintiff's claim of vote dilution.

Although the record at trial does not evidence a significant lack of responsiveness on the part of elected officials to the particularized needs of American Indian citizens of Blaine County, the Court finds that the policy underlying the County's use of the at-large election method for its County Commission is tenuous. In this regard, Defendants maintain that the at-large election method is warranted because it makes the Blaine County Commission responsible to the needs of the entire County. Nevertheless, Blaine County regards the residency conditions of each Commissioners as important. Appointments to County Board, Authorities and Commissions are made on the basis of the existing residency districts. Finally, each Commissioner is responsible for the maintenance of County roads within their respective residency districts. Blaine County Commissioner Don Swenson explained at trial that the purpose of the residency districts is to provide representation to the different interests and to the

different geographic areas within Blaine County. The record is thus clear that to some extent governance of Blaine County is already conducted on the basis of the Commissioner's subdistricts of residence.

The Court rejects Defendant's argument that this Court must find any adverse voting impact suffered by American Indians in Blaine County was the result of racial bias. Although, a plurality in *Gingles* rejected proof of intent to discriminate against minority voters to establish a § 2 violation, the issue remains disputed. *Gingles,* 478 U.S. at 43-44. On this issue, the Supreme Court plurality issued a strong statement. Justice Brennan's plurality opinion rejected any requirement of intent or causation in order to find vote dilution. *Id.* at 62-63, 70-71. In her concurrence, Justice O'Connor stated, "evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters . . . can never affect the overall vote dilution inquiry." *Id.* at 100 (O'Connor, J., concurring). Finally, Justice White joined Justice O'Connor in this view stating in his concurrence that "[u]nder Justice Brennan's test, there would be polarized voting and a likely § 2 violation of all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. . . . This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did." *Id.* at 83 (White, J., concurring). Taken together, all of the Justices concluded that no intent was required for a §2 violation.

In *Smith v. Salt River Project Agric. Improvement and Power Dist.,* the Ninth Circuit Court of Appeals weighed in

on the issue of intent and the results test. The case involved voting in an agricultural district where land ownership was required to be allowed to vote. The Ninth Circuit Court of Appeals concluded that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry. Instead, '[s]ection 2 plaintiffs must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result.'" 109 F.3d 586, 595 (9th Cir. 1997) (quoting *Ortiz v. City of Philadelphia Office of the City Comm'rs,* 28 F.3d 306, 312 (3d Cir. 1994)). However, in *Ruiz,* the Ninth Circuit tempered its view holding that "it seems clear that requiring proof of intentional discrimination or racist motives in any part of a vote dilution claim 'diverts the judicial inquiry from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.'" *Ruiz,* 160 F.3d at 557 (quoting S. Rep. at 18). The Court went on to hold that "proof of groupwide or individual discriminatory motives has no part in a vote dilution claim." *Id.* Taken together, this Court concludes that an inference can be shown that racial bias operates "through the medium of the targeted electoral structure to impair minority political opportunities. . . . [but] the resultant inference is not immutable, but it is strong; it will endure *unless and until* the defendant adduces credible evidence tending to prove that detected voting patterns can mos. logically be explained by factors unconnected to the intersection of race with the electoral system." *Uno,* 72 F.3d at 983.

Finally, contrary to Defendants' assertion, Montana state law does not prevent Blaine County from changing the election method for its County Commission. Indeed, the Montana Constitution allows that local governments

must review procedural election requirements. Mont. Const. Art. XI, § 9. Montana law further provides a mechanism for a local government to review the Blaine County Commission's election method under the Montana Constitution. Mont. Code Ann. §§ 7-3-171 (1991). *See generally,* Mont. Code Ann. §§ 7-3-171 to 7-3-193 (1991). This mechanism allows for changes in the method of electing County Commissioners, including the adoption of single-member district plans, and has been adopted by several Montana counties. Indeed, Blaine County utilized a charter study commission in 1984 and 1994, but according to Commissioner Victor Miller, the charter commission did not give consideration to whether the at-large method of election resulted in dilution of Indian voting strength. Therefore, under the totality of circumstances, Blaine County's interest in maintaining the at-large method of election for its County Commission must be characterized as tenuous, particularly when compared to the overall interest in terminating the dilution of American Indian voting strength which results from the use of the at-large voting method for election of Blaine County Commissioners.

C. CONCLUSION REGARDING VOTE DILUTION

Having found that Plaintiff has established all three *Gingles* factors, and that the vast majority of the Senate factors weigh in favor of Plaintiff's claim, the Court concludes that under the totality of circumstances, American Indians in Blaine County are denied an equal opportunity to participate in the political process and to elect representatives of their choice as a result of the at-large method of election for members of the Blaine County Board of Commissioners in violation of § 2 of the Voting

Rights Act of 1965. Plaintiff's claims for declaratory and injunctive relief must, therefore, be granted.

ORDER

Therefore, for the reasons set forth in the foregoing Findings of Fact and Conclusions of Law, the Court concludes that Judgment must be entered in favor of Plaintiff.

IT IS THEREFORE ORDERED that Plaintiff's Complaint for a declaration that the existing at-large staggered term method of electing the Blaine County Board of Commissioners violates § 2 of the Voting Rights Act of 1965 is Granted.

IT IS FURTHER ORDERED that Defendants, their agents and successors in office, and all persons acting in concert with any of them, are hereby enjoined from administering, implementing, or conducting future elections for the Blaine County Commission under the at-large staggered term method of election.

IT IS FURTHER ORDERED that Defendants shall, not later than April 26, 2002, develop and file with the Court an election plan for the Blaine County Board of Commissioners that remedies the § 2 violation found to exist by these Findings of Fact and Conclusions of Law. In preparing the proposed election plan, counsel for Defendants shall forthwith meet and confer with counsel for Plaintiff in an effort to resolve issues regarding the form of election plan submitted to the Court by Defendants on or before April 26, 2002.

DATED: March 20, 2002

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

THE UNITED STATES OF AMERICA, Plaintiff, v. BLAINE COUNTY, MONTANA; DON K. SWENSON, ARTHUR KLEINJAN and VICTOR J. MILLER, in their official capacities as members of the Blaine County Board of Commissioners; and SANDRA BOARDMAN, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County, Montana, Defendants.	CV-S-99-122-GF-PMP *JUDGMENT* (Filed Mar. 21, 2002)

The Court having rendered a decision this date contained in the Court's Findings of Fact and Conclusions of Law,

JUDGMENT is hereby entered in favor of Plaintiff United States of America and against Defendants Blaine County, Montana, Don K. Swenson, Arthur Kleinjan and Victor J. Miller, in their official capacities as members of the Blaine County Board of Commissioners, and Sandra Boardman, in her official capacity as Clerk and Recorder

and Superintendent of Elections for Blaine County, Montana, as follows:

1. The Court declares that the existing at-large staggered term method of electing the Blaine County Board of Commissioners violates § 2 of the Voting Rights Act of 1965;

2. Defendants, their agents and successors in office, and all persons acting in concert with any of them, are hereby enjoined from administering, implementing, or conducting future elections for the Blaine County Commission under the at-large staggered term method of election;

3. Defendants shall, not later than April 26, 2002, develop and file with the Court an election plan for the Blaine County Board of Commissioner that remedies that § 2 violations found to exist by the Court's Findings of Fact and Conclusions of Law entered concurrent herewith. In preparing the proposed election plan, counsel for Defendants shall forthwith meet and confer with counsel for Plaintiff in an effort to resolve issues regarding the form of election plan submitted to the Court by Defendants on or before April 26, 2002.

DATED: March 20, 2002

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

157 F.Supp.2d 1145

United States District Court,
D. Montana,
Great Falls Division.

The UNITED STATES of America, Plaintiff,
v.
BLAINE COUNTY, Montana; Don K. Swenson, Arthur Kleinjan and Victor J. Miller, in their official capacities as members of the Blaine County Board of Commissioners; and Sandra Boardman, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County, Montana, Defendants.

No. CV99-122GFPMP.

July 23, 2001.

Christopher Coates, Joseph D. Rich, Sabrina Whitehead Jenkins, Avner Shapiro, Civil Rights Division, U.S. Department of Justice, Washington, D.C., Bill Mercer, Assistant U.S. Attorney, Missoula, for Plaintiff.

J. Scott Detamore, William Perry Pendley, Mountain States Legal Foundation, Denver, CO, Rebecca W. Watson, Gough, Shanahan, Johnson & Waterman, Helena, MT, for Defendants.

ORDER

PRO, District Judge.

I. INTRODUCTION

Before the Court for consideration is a Motion for Summary Judgment (Docs. # 23, # 24 and # 25) filed by

Defendants Blaine County, Montana, Don K. Swenson, Arthur Kleinjan, Victor Miller and Sandra Boardman (collectively referred to as "Blaine County") on January 31, 2001. Plaintiff United States of America ("United States") filed a Response to Defendants' Motion for Summary Judgment (Docs. # 30 and # 31) on February 28, 2001. Blaine County filed a Reply (Doc. # 35) on March 14, 2001.

On May 17, 2001, this case was reassigned from the United States District Court for the District of Montana, Great Falls Division to the United States District Court for the District of Nevada by order of Chief Judge Donald W. Molloy (Doc. # 47).

On July 6, 2001, this Court heard oral argument regarding Blaine County's Motion for Summary Judgment.

II. FACTUAL BACKGROUND

Blaine County, Montana is governed by a three member Board of Commissioners elected at large by all of the voters in the County. Candidates must reside in one of three districts, but the entire County elects each Commissioner. Commissioners are elected to six year terms, and the terms are staggered such that one County Commissioner position is open for election every two years.

According to the 1990 census, Blaine County has a total population of 6,728. The County is predominantly comprised of two ethnic groups, with 59.8% of Blaine

County residents being Caucasian, and 39.2% of residents being Native American.[1]

The United States contends that the current system of at-large apportionment has resulted in discrimination against Native Americans. To support this claim, they note that no Native American has served as a County Commissioner in the eighty-six year history of Blaine County. The United States asserts that if the present voting scheme was converted to single member districts, the Native American population is sufficiently numerous and geographically compact so that Native Americans would likely constitute a voting majority in one of the single member districts.

In its complaint, the United States alleges that Blaine County's current voting system violates § 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1994), in that Native Americans have less opportunity than their Caucasian counterparts to elect representatives of their choice. Blaine County has filed the instant Motion for Summary Judgment alleging that the 1982 amendments to § 2 of the Voting Rights Act are unconstitutional on their face and unconstitutionally applied in this case.

III. LEGAL STANDARD FOR MOTION FOR SUMMARY JUDGMENT

A motion for summary judgment is a procedure which terminates, without a trial, actions in which "there is no genuine issue as to any material fact and that the moving

---

[1] Results from the 2000 census have not thus far been provided to the Court.

party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A summary judgment motion may be made in reliance on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." *Id.*

The United States Supreme Court delineated Rule 56 in a trilogy of opinions rendered in 1986. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). According to the Court, the movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate " 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.,* 477 U.S. at 324, 106 S.Ct. 2548 (quoting Fed.R.Civ.P. 56(e)). In order to preclude a grant of summary judgment, the non-moving party must do more than show that there is some "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co.,* 475 U.S. at 586, 106 S.Ct. 1348. Rather, the non-moving party must set forth " 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 587, 106 S.Ct. 1348 (quoting Fed.R.Civ.P. 56(e)). The substantive law defines which facts are material. *Liberty Lobby,* 477 U.S. at 248, 106 S.Ct. 2505.

The court views all underlying facts in the light most favorable to the non-moving party. *Martinez v. City of Los Angeles,* 141 F.3d 1373, 1378 (9th Cir.1998) (citing *Matsushita Elec. Indus. Co.,* 475 U.S. at 587, 106 S.Ct. 1348).

Although the non-moving party has the burden of persuasion, the party moving for summary judgment has

the initial burden of showing the absence of a genuine issue of material fact. *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir.1996). That burden is met by showing an absence of evidence to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325, 106 S.Ct. 2548. The burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Liberty Lobby,* 477 U.S. at 250, 106 S.Ct. 2505. In meeting this burden, parties seeking to defeat summary judgment cannot rest upon allegations of denials of pleadings, but must demonstrate a genuine issue for trial. *Brinson v. Linda Rose Joint Venture,* 53 F.3d 1044, 1049 (9th Cir.1995). Under Rule 56(e), the adverse party must allege specific facts supported by affidavit that raise triable issues. *Id.* Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *Keenan v. Allan,* 91 F.3d 1275, 1278 (9th Cir.1996).

IV. DISCUSSION

Blaine County claims that summary judgment is appropriate because § 2 of the Voting Rights Act is unconstitutional. It bases this assertion on the theory that § 2 violates the Tenth and Eleventh Amendments by excessively interfering with a state's right to conduct its own elections.

The Voting Rights Act of 1965 was adopted via Congress' power under the § 5 enforcement provision of the Fourteenth Amendment. Initially, Congress designed the Act to remedy literacy testing, poll taxes, and other devices used to disenfranchise black voters in the mid-1960's. While the Act was somewhat effective, eligible black voters continued to vote less frequently than their white counterparts.

Congress amended the Act in 1970 and 1975 to combat new tactics used to restrict minority voting in response to the 1965 legislation.

Prior to 1982 and after the United States Supreme Court's decision in *City of Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), a plaintiff under § 2 was required to show discriminatory intent on the part of state actors in order to prevail. This standard was difficult to meet in most cases, thus limiting the effectiveness of the Voting Rights Act. In 1982, Congress amended the Act once again. This time lessening the burden for plaintiffs claiming discrimination. Instead of proving discriminatory intent, a plaintiff needed to merely demonstrate discriminatory results under the 1982 amendments to the Act.

The constitutionality of the Voting Rights Act has been unsuccessfully challenged many times, both before and after the 1982 amendments. The Supreme Court addressed the issue of whether the Voting Rights Act was an excessive application of congressional power and, therefore, encroached on areas reserved to the states in *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). The Court held that the Voting Rights Act was an "appropriate means for carrying out Congress' constitutional responsibilities and [is] consonant with all other provisions of the Constitution." *Id.* at 308, 86 S.Ct. 803. In *U.S. v. Marengo County Comm'n,* 731 F.2d 1546 (11th Cir.1984), *cert. denied,* 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984), the Eleventh Circuit ruled that the 1982 amendments imposing the results, rather than intent, standard was constitutional. *Id.* at 1556. Additionally, in *Major v. Treen,* 574 F.Supp. 325, 343 (E.D.La.1983), the United States District Court for the

Eastern District of Louisiana upheld the constitutionality of the 1982 amendments.[2]

Congress is broadly empowered by § 2 of the Fifteenth Amendment to prohibit state action that, though itself does not violate § 1, but instead perpetuates the effects of past discrimination. *City of Rome v. United States,* 446 U.S. 156, 176, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980).

> "Congress seeks to protect the core values of these amendments through a remedial scheme that invalidates election systems that, although constitutionally permissible, might debase the amendments' guarantees. Congressional power to adopt prophylactic measures to vindicate the purposes of the fourteenth and fifteenth amendments is unquestioned."

Jones v. City of Lubbock, 727 F.2d 364, 373 (5th Cir.1984). The Voting Rights Act seeks in part to remedy minority vote dilution created by state and local electoral systems. "We reject any assertion that the statute as amended applies only to formal barriers to access such as literacy or residency tests. The goal of the Voting Rights Act has always been to ensure an effective right of participation." *Marengo County,* 731 F.2d at 1556. In *Jordan v. Winter,* 604 F.Supp. 807, 812 (N.D.Miss.1984), *aff'd sub nom. Mississippi Republican Executive Comm. v. Brooks,* 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984), the court implemented a redistricting plan which addressed issues of racial bloc voting. The plaintiffs in that case established that voters in Mississippi voted for candidates on the basis

---

[2] In its moving papers, Blaine County does not cite to any specific case finding that the 1982 amendments to the Voting Rights Act are unconstitutional. Nor is this Court aware of any such cases.

of race. *Id.* "[B]lacks consistently lose elections in Mississippi because the majority voters choose their preferred candidates on the basis of race. We therefore find racial bloc voting operates to dilute black voting strength. . . . " *Id.* at 812, 813; *see also, Rogers v. Lodge,* 458 U.S. 613, 623, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982).

Blaine County argues that the 1982 amendments to the Voting Rights Act are unconstitutional when applied to jurisdictions such as itself, where no historical specific evidence of voting discrimination has been identified or was relied upon in the legislative history of the 1982 amendments. The Supreme Court has previously held however, that such laws with national scope are valid exercises of Congressional authority. In *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272, (1970), the Supreme Court concluded that Congress had not exceeded its authority in enacting a five-year national ban on the use of qualification tests in both state and local elections. *Id.* at 154, 91 S.Ct. 260.

Blaine County claims that the Act is nevertheless unconstitutional in the wake of the recent Supreme Court decisions beginning with *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) and culminating with the recently decided *Bd. of Tr. of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). The holdings in these cases limited the application of Congress' enforcement power under the Thirteenth, Fourteenth, and Fifteenth Amendments. However, these cases are distinguishable from the case before this Court.

For a law to be a valid exercise of Congressional power under § 5 of the Fourteenth Amendment, "[t]here must be

a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne,* 521 U.S. at 520, 117 S.Ct. 2157. This two-prong test, congruence and proportionality, has become the standard for evaluating laws passed under the enforcement provision of the Fourteenth Amendment.

Congruence refers to the relationship between the laws passed by Congress and the wrong Congress seeks to remedy. "While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved." *Id.* at 530, 117 S.Ct. 2157. The appropriateness of remedial measures must be considered in light of the evil presented. *Katzenbach,* 383 U.S. at 308, 86 S.Ct. 803. "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id.* at 334, 86 S.Ct. 803. Thus, the Court has established that while Congress may enact remedial laws to address Fourteenth Amendment violations, the laws must be closely related to the harms addressed.

Proportionality is the second component of the two-prong test. In the recent Supreme Court cases cited by Blaine County, the Court was careful to examine whether the enacted legislation extended beyond the identified discrimination to adversely affect others who had not been guilty of conduct with discriminatory results. The ultimate purpose of the two-prong analysis is to ensure that Congressional acts passed under the § 5 enforcement power of the Constitution are limited to remedial measures, rather than substantive law.

In *Boerne,* the Supreme Court considered whether the Religious Freedom Restoration Act (RFRA), which prohibited

any law that had a substantial impact on the right of persons to practice their religion, was a constitutional application of the § 5 enforcement power. *Boerne,* 521 U.S. at 515, 516, 117 S.Ct. 2157. The Court held that it was not. *Id.* at 536, 117 S.Ct. 2157. The Court found that Congress had little factual basis for assessing the magnitude of the discriminatory conduct, thus making the showing of congruence impossible. *Id.* at 530, 117 S.Ct. 2157. Moreover, the RFRA could be broadly applied to limit actors who had never discriminated, thus failing to meet the proportionality prong of the constitutional test. *Id.* at 532, 117 S.Ct. 2157. The Court found the RFRA to be substantive, rather than remedial law, and thus an unconstitutional application of the § 5 power. *Id.*

The Court similarly found that Congress could not apply the Patent Remedy Act to the states in *Florida Prepaid Postsecondary Expense Bd. v. Coll. Sav. Bank,* 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999). The Court held that such application was substantive legislation rather than enforcement. *Id.* at 647, 119 S.Ct. 2199. Again, Congress had little factual basis for identifying the wrong and had instituted a presumptively remedial scheme which made all states immediately open to suit in federal court for "all kinds of possible patent infringement and for an infinite duration." *Id.* at 647, 119 S.Ct. 2199. Thus, the Patent Remedy Act exceeded the enforcement powers granted to Congress under the Fourteenth Amendment. *Id.* The Court similarly invalidated other Congressional acts in *Coll. Sav. Bank v. Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (invalidating application of the Trademark Infringement Act against states), and *Kimel v. Florida Board of Regents,* 528 U.S.

62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (invalidating application of the Age Discrimination in Employment Act against states).

Blaine County also relies on the Supreme Court's holding in *U.S. v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), which invalidated the Violence Against Women Act (VAWA). The Supreme Court in *Morrison* invalidated VAWA because it was directed not at states or state actors, but instead toward private conduct. *Id.* at 621, 120 S.Ct. 1740. The § 5 enforcement power deals only with Congress' enforcement against states, not against individuals. *Id.* While VAWA was directed at private conduct, the Voting Rights Act is directed at states and state actors and thus Blaine County's reliance on *Morrison* is misplaced. Although racial bloc voting giving rise to minority vote dilution can be a form of private discrimination, it is the perpetuation of such a system by state actors that runs afoul of the Voting Rights Act and the Constitution.

Most recently, the Supreme Court held that the Americans with Disabilities Act was an excessive application of § 5 enforcement power in *Bd. of Tr. of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866. Relying on prior equal protection precedent, the Court concluded that states were not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards the disabled had a rational basis. *Id.* at 972. Thus, legislation regarding special accommodations for the disabled would need to come from positive law and not through the enforcement power of § 5. *Id.* at 964. Moreover, Congress had not identified a history and pattern of unconstitutional

employment discrimination by the states against the disabled because its investigation and legislative history fell short of suggesting a pattern of unconstitutional discrimination on which Fourteenth Amendment legislation was required to be based. *Id.* at 967. Even if such a pattern of discrimination were shown, however, the rights and remedies in the ADA were not congruent and proportional to the targeted violation given the ADA's sweeping requirements. *Id.*

The Voting Rights Act is distinguishable from the aforementioned Acts held unconstitutional by the Supreme Court in two fundamental respects. First, Congress did have a factual basis for adopting not only the Voting Rights Act, but also its subsequent amendments. When adopting the Voting Rights Act, Congress had before it an extensive record of voting discrimination against minorities. *Katzenbach,* 383 U.S. at 310-12, 86 S.Ct. 803. Even so, Congress need not make specific findings concerning the severity or pervasiveness of voting discrimination each and every time it seeks to redress a purported wrong. *Mitchell,* at 147, 91 S.Ct. 260; *Fullilove v. Klutznick,* 448 U.S. 448, 503, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (Powell, J. concurring). The fact that the Act was primarily intended to remedy discrimination against African Americans in the southern states in the 1960's does not make it any less proper to use as a remedy for discrimination against Native Americans today. There is ample evidence that American Indians have historically been the subject of discrimination in the area of voting. *See, e.g., Little Thunder v. South Dakota,* 518 F.2d 1253, (8th Cir.1975); *Goodluck v. Apache County,* 417 F.Supp. 13 (D.Ariz.1975); *Yanito v. Barber,* 348 F.Supp. 587 (D.Utah 1972); *Klahr v. Williams,* 339 F.Supp. 922 (D.Ariz.1972).

Moreover, the remedy here is proportional to the harm. First, as described above, the Supreme Court has affirmed Congressional authority to pass laws relating to voting discrimination that are national in scope. Second, the Voting Rights Act does not require that districts be drawn so that minorities are guaranteed representation. It merely requires that they be given an equal chance at electing minority representatives only after they have shown that discriminatory results are present as a result of suspect voting procedures. *42 U.S.C. § 1973* (1982). Thus, the Voting Rights Act satisfies the congruence and proportionality requirements for a valid exercise of § 5 power.

Finally, throughout the recent Supreme Court cases cited by the Blaine County, there exists an element missing that is present in this case. None of these recently decided Supreme Court cases addressed voting issues. This is significant in that equal opportunity for voting for all ethnic groups was a primary basis for the Fourteenth and Fifteenth Amendments. The Court finds Congress did not exceed its authority under the Civil War Amendments in crafting the Voting Rights Act which is designed to remedy the very harm of voting discrimination that the Amendments were adopted to prevent.

V. CONCLUSION

IT IS THEREFORE ORDERED that Defendant Blaine County's Motion for Summary Judgment (Docs. # 23, # 24 and # 25) is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BLAINE COUNTY, Montana; et al., Defendants-Appellants, v. JOSEPH F. MCCONNELL; et al., Plaintiff-Intervenors-Appelles.	No. 02-35691 D.C. No. CV-99-00122-PMP District of Montana, Great Falls ORDER (Filed Sep. 7, 2004)

Before: WARDLAW, GOULD, and PAEZ, Circuit Judges.

The panel has voted to deny the appellants' petition for rehearing en banc. The full court has been advised of the appellants' petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b). Therefore, the petition for rehearing en banc is DENIED.

UNITED STATES CONSTITUTION AMENDMENT XIV.

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or

hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CONSTITUTION AMENDMENT XV.

UNIVERSAL MALE SUFFRAGE

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Section 2 of the Voting Rights Act (42 U.S.C. § 1973)

Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 4 of the Voting Rights Act (42 U.S.C. § 1973b)

Suspension of the use of tests or devices in determining eligibility to vote

(a) Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court.

(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless

the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action –

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section;

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners under subchapters I-A to I-C of this chapter have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory –

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under subchapters I-A to I-C of this chapter; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United

States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has

been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of Title 28.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Voting Rights Act Amendments of 1982.

(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Voting Rights Act Amendments of 1982.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section. Any aggrieved party may as of right intervene at any stage in such action.

(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register.

The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State

which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable

in any court and shall be effective upon publication in the Federal Register.

(c) "Test or device" defined.

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices.

For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English.

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in

American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

(f) Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures.

(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that,

where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or

voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Section 5 of the Voting Rights Act (42 U.S.C. § 1973c)

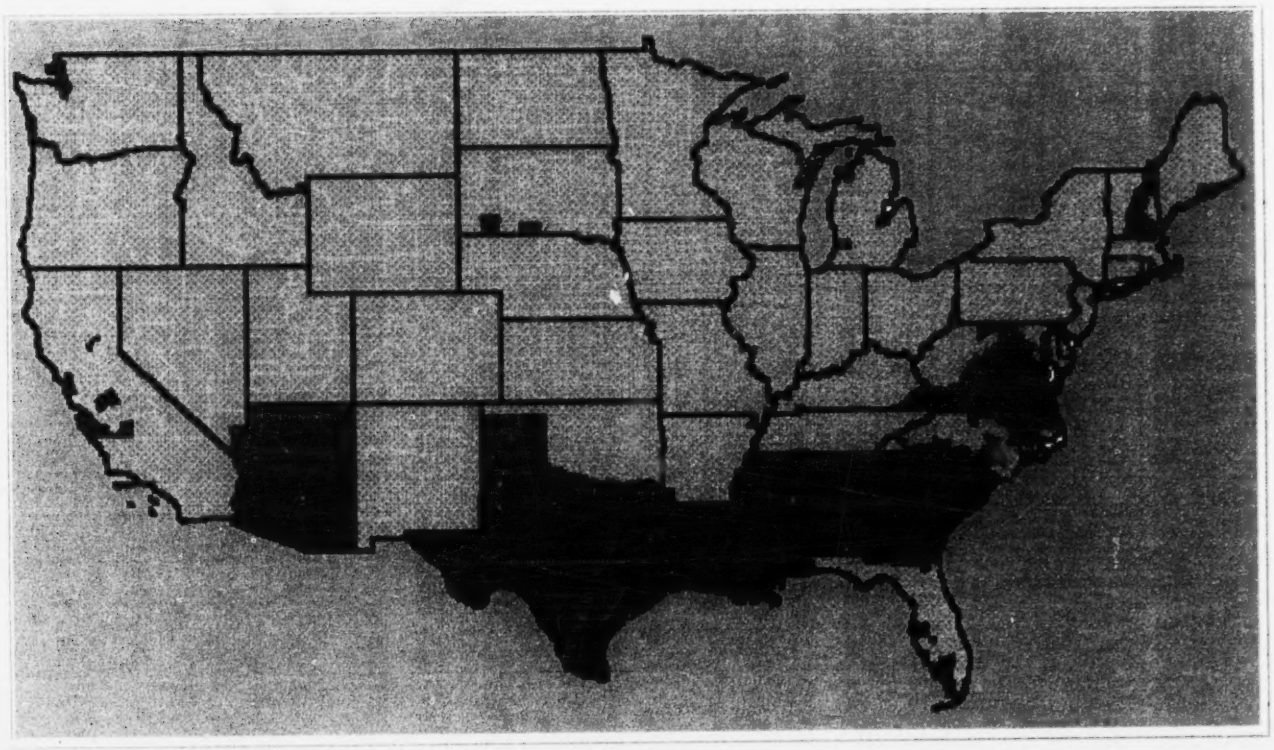
Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b), of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from

that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such

qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

1. **U.S. Department of Justice**
Civil Rights Division
Voting Section
2. **Section 5 Covered Jurisdictions**



Key: Covered Jurisdictions

States Covered as a Whole

Covered Counties in States Not Covered as a Whole

Covered Townships in States Not Covered as a Whole

States Covered as a Whole (In red on map)	Applicable Date	Fed Register	Date
Alabama	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Alaska (not shown above)	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Arizona	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Georgia	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Louisiana	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Mississippi	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
South Carolina	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Texas	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Virginia[1/]	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.

Covered Counties in States Not Covered as a Whole (In blue on map)	Applicable Date	Fed Register	Date
California:			
Kings County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Merced County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Monterey County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Yuba County	Nov. 1, 1968	36 FR 5809	Mar. 27. 1971.
Yuba County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.

Florida:

Collier County	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Hardee County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Hendry County	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Hillsborough County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Monroe County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.

New York:

Bronx County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Bronx County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Kings County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Kings County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
New York County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.

North Carolina:

Anson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Beaufort County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Bertie County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Bladen County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Camden County	Nov. 1, 1964	31 FR 3317	Mar. 2, 1966.
Caswell County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Chowan County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.

Cleveland County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Craven County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Cumberland County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Edgecombe County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Franklin County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Gaston County	Nov. 1, 1964	31 FR 5081	Mar. 29 1966.
Gates County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Granville County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Greene County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Guilford County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Halifax County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Harnett County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Hertford County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Hoke County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Jackson County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Lee County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Lenoir County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Martin County	Nov. 1, 1964	31 FR 19	Jan. 4, 1966.
Nash County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.

Northampton County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Onslow County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Pasquotank County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Perquimans County	Nov. 1, 1964	31 FR 3317	Mar. 2, 1966.
Person County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Pitt County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Robeson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Rockingham County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Scotland County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Union County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Vance County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Washington County	Nov. 1, 1964	31 FR 19	Jan. 4, 1966.
Wayne County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Wilson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.

South Dakota:

Shanon County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.
Todd County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.

Covered Townships in States Not Covered as a Whole (In pink on map)		Applicable Date	Fed Register	Date
Michigan:				
Allegan County:	Clyde Township	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Saginaw County:	Buena Vista Township	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
New Hampshire:				
Cheshire County:	Rindge Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Coos County:	Millsfield Township	Nov. 1, 1968	39 FR 16912	May 10, 1974
	Pinkhams Grant	Nov. 1, 1968	39 FR 16912	May 10, 1974
	Stewartstown Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
	Stratford Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Grafton County:	Benton Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Hillsborough County:	Antrim Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Merrimack County:	Boscawen Town	Nov. 1, 1968	39 FR 16912	May 10, 1974

Rockingham County:	Newington Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Sullivan County:	Unity Town	Nov. 1, 1968	39 FR 16912	May 10, 1974

Notes

[1] Three political subdivisions in Virginia (Fairfax City, Frederick County and Shenandoah County) have "bailed out" from coverage pursuant to Section 4 of the Voting Rights Act The United States consented to the declaratory judgment in each of those cases.

Senate Factors

(S. Rep. No. 97-417, at 28-29 (1982),
reprinted in 1982 U.S.C.C.A.N. 177)

1. [T]he extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction;

8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."